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THE EFFECTIVENESS OF ABORTION LEGISLATION IN SIX COUNTRIES

THIS paper is a modified version of a memorandum submitted, in April, 1938, to the Inter-Departmental Committee on Abortion.¹ It attempts to analyse the efforts which have been and are being made in a number of countries to check the frequency of abortion. France is dealt with in some detail, since the literature for that country has been most easily accessible to the present writer, but reference will also be made to the position in Belgium, Germany, Norway, Sweden and Denmark.

In France and Belgium the law relating to abortion derives directly from the *Code Pénal* of 1810, Paragraph 317, under which the penalties prescribed were—

(a) Penal servitude (*réclusion*)² for anyone who, by foods (*aliments*), beverages, medicaments, violence, or any other

¹ The population Investigation Committee, of which the writer is the Research Secretary, was asked to submit a memorandum to the Inter-Departmental Committee, the terms of reference of the latter Committee being "to enquire into the prevalence of abortion and the law relating thereto, and to consider what steps can be taken, by more effective enforcement of the law or otherwise, to secure the reduction of maternal mortality and morbidity arising from this cause." Since the present paper—as also the memorandum on which it is based—was written by one person, the opinions expressed in it cannot, of course, be taken as anything more than the personal opinions of the writer, and should not be regarded as indicative of the views of the Population Investigation Committee as a whole.

² The terms have been given the nearest translation in English. In France, *réclusion* means penal servitude for five to ten years, and *travaux forcés à temps* means imprisonment with hard labour for five to twenty years. (Garraud, R., *Traité Théorique et Pratique du Droit Pénal Français*, Paris, edn. of 1891, Vol. I, p. 605). *Travaux forcés* appears to have entailed transportation to a penal colony

means, procures the abortion of a pregnant woman, whether the woman has given her consent or not.

(b) The same penalty applies to a woman who procures an abortion on herself, or who has consented to use the means indicated or administered to her, if such means result in an abortion.

(c) Doctors, surgeons and other health officials,³ as well as pharmacists, who indicate or administer such means will be sentenced to hard labour (*travaux forcés à temps*) if an abortion ensues.⁴

In Belgium it was intended to reform the code in 1830, when the country gained its independence, but nothing was done until 1867. In that year, however, the whole penal code was subjected to considerable modifications, and the law relating to abortion was changed to the form in which it is still found to-day. Under the new law the following penalties were prescribed⁵—

(a) Penal servitude (*réclusion*) from five to ten years for anyone who intentionally procures an abortion by foods, beverages, medicaments, violence or any other means upon a woman who has not consented to the abortion.⁶

(b) Imprisonment (*emprisonnement*) for two to five years, and a fine of 100 to 500 francs if the abortion is procured with the consent of the woman.⁷

and, under the law of 30th May, 1854, this also involved an enforced residence in the penal colony, after the sentence had been served, for a period equal to the length of the prison sentence if the sentence were for less than eight years, and for life if the sentence were for more than eight years (Roux, J. A., *Cours de Droit Criminel Français*, Paris, 1927, Vol. I, p. 407). Transportation has just been abandoned in France. It is not, of course, part of the Belgian system of penalties. In Belgium, *réclusion* has the same meaning as in France, but *travaux forcés à temps* extends for ten to fifteen, or for fifteen to twenty years. (Nypels, J. S. G., *Le Code Pénal Belge Interprété*, Bruxelles, 1878, Vol. II, pp. 71-89). *Travaux forcés* and *réclusion* are penalties for criminal offences, and the crimes for which they are given are tried by jury. Simple imprisonment (*emprisonnement*) is given for a misdemeanour, tried by a magistrate's court (*tribunal correctionnel*).

³ Midwives were, in practice, included in the category of health officials who were liable to specially heavy penalties. Herbalists were not. (See Garraud, *op. cit.*, and Griolet, G., Vergé, C., and Bourdeaux, H., *Code d'Instruction Criminelle et Code Pénal*, Collection Dalloz, Paris, edn. of 1912, p. 424.)

⁴ According to the interpretation of the law in France, attempted abortion was not punished in the case of a woman who tried to procure an abortion on herself. But attempts by other persons were liable to the same penalties as if an abortion had actually taken place, though in such cases doctors, etc., were not liable to the specially heavy penalties (Garraud, *op. cit.*, Vol. IV). In Belgium, however, attempted abortions were not punishable, according to a decision of the Court of Appeal. (Nypels, *op. cit.*, Vol. II.)

⁵ Articles 348-353 of the penal code (*Codes Edmond Picard*, Bruxelles, 1937, Vol. II, p. 31).

⁶ If the abortion is produced by wilful violence not, however, applied with the intention of producing an abortion, the penalty is imprisonment (*emprisonnement*) for three months to two years and a fine of 26 to 300 francs (paragraph 349).

⁷ The fines are increased sevenfold since the devaluation of the Belgian franc.

(c) Imprisonment for two to five years, and a fine of 100 to 500 francs for a woman who procures her own abortion.

(d) If the death of the woman ensues, the penalty for those administering or assisting in the administration of the means is penal servitude (*réclusion*) for five to ten years if the woman had consented to the abortion, and hard labour (*travaux forcés*) for ten to fifteen years if she had not consented.⁸

(e) In the cases set out in (a), (b) and (d), the penalties are increased if the guilty person is a doctor, surgeon, accoucheur, midwife, health official or pharmacist. In such cases the penalties of imprisonment, penal servitude or hard labour for ten to fifteen years, are raised to penal servitude, hard labour for ten to fifteen years and hard labour for fifteen to twenty years respectively.⁹

For France the code remained substantially unchanged until the law of 27th March, 1923, which modified Paragraph 317 of the penal code, and instituted new penalties for abortion. These are¹⁰—

(a) Imprisonment (*emprisonnement*) from 1 to 5 years and a fine of 500 to 10,000 francs for anyone who, by means of foods (*aliments*), beverages, medicaments, manipulation, violence or in any other way procures or attempts to procure the abortion of a pregnant woman, with or without the consent of this woman.

(b) Imprisonment (*emprisonnement*) from 6 months to 2 years and a fine of 100 to 2000 francs for any woman who induces an abortion on herself or who agrees to use means

⁸ No analogous provisions were made in the 1810 code, which made the guilty person responsible for all the consequences of acts which he had wilfully performed. If death ensued, the guilty person was thus responsible for murder. But in France the position was changed by the law of 28th April, 1832, under which the penalty for wilful violence resulting in death, the death not being premeditated, was punishable by *travaux forcés à temps*. This was retained by the law of 13th May, 1863. (See Griole, Verge, Bourdeaux, *op. cit.*, pp. 413-414, and Garraud, R., *Traité Théorique et Pratique du Droit Pénal Français*, edn. of 1924, reprinted, 1937, Vol. V.) and still holds good (Roué, P. "L'Avortement en Droit Pénal," *La Grande Réforme*, supplement to May, 1938).

⁹ Attempted abortion is punishable only when the woman has not consented to the abortion (the woman herself never being punishable). In such cases, paragraph 52 of the penal code applies, stipulating that the penalty given shall be immediately below that prescribed for the accomplished act. In practice the question of the punishment of attempted abortion is complicated by the factors of consent on the part of the woman, and of whether the attempt was by a doctor, surgeon, etc. Mr. Raymond Storms (in a letter to the present writer, August, 1938) says that paragraph 52 of the penal code applies only if the abortive measures, administered without the consent of the woman, have been completely undertaken, but have nevertheless failed to take effect. Simple attempts are not punishable unless they are undertaken by doctors, surgeons, etc., upon women who have consented to the attempts.

¹⁰ R. Garraud, *op. cit.*, 1924 edn., p. 374, footnote, and Bourdeaux, H., *Code Pénal* (Collection Dalloz), Paris, 1938 edn., pp. 153-4.

indicated or administered to her for that purpose, if these means produce an abortion.^{10a}

(c) Doctors, health officials, midwives, dental surgeons, pharmacists and medical students, pharmaceutical students and employees in pharmacies, herbalists, truss-makers and dealers in surgical instruments who have indicated, advocated or practised these measures shall be punished in accordance with the penalties prescribed in (a).¹¹

(d) In accordance with Articles 25 and 26 of the law of 30th November, 1892, guilty persons may, in addition, be temporarily or permanently prohibited from practising their professions, such suspension also being applicable to pharmacists and herbalists as well as to students of these two professions. Further, the tribunals may sentence such persons to not less than two or more than ten years' exile from their place of residence, in accordance with Article 19 of the law of 27th May, 1885.^{11a}

It is important to note that the changes in the Belgian and French laws were not dictated to any appreciable extent by feelings of humanitarianism. It is true that many writers objected to the fact that an unfortunate woman who, because of poverty, induced an abortion on herself, should be subject to the same penalties as a professional abortionist.¹² But in general, as can

^{10a} If the woman dies there is a double offence which may be proceeded against both under Paragraph 317, and under Paragraph 309 of the penal code (Roué, P., *op. cit.*). Garraud (1924 edn., Vol. 5, p. 380) says that the prosecution may be both for abortion, and for wilful violence causing death without being specifically intended to do so (*sans intention de la donner*).

¹¹ Notice that paragraph 317 now applies to persons *advocating* methods for procuring an abortion. The sale of a catheter, with instructions for using it to procure an abortion would thus be punishable under this paragraph. (See also subsequent discussion of 1920 law.) In neither France nor Belgium does the law make any provision for therapeutic abortion, though it is tolerated in practice. (See Madame Anchel-Bach in *Bulletin de l'Association Française des Femmes Médecins*, January-March, 1937). But Nypels states explicitly that the law was not aimed at a doctor who procured an abortion in order to save the life of a woman whose physiological deficiencies would make normal termination of pregnancy impossible (*op. cit.*, Vol. II).

^{11a} *Interdiction de séjour*—really prohibition of the right of entry to, or residence in certain areas.

¹² In addition, of course, to the voluminous publications of neo-Malthusian writers. Towards the end of the nineteenth century, a very aggressive birth control movement developed in France, but it appears to have had no influence upon subsequent legislation. See Giroud, G., *Paul Robin* (Paris, 1937), especially Chapters X and XI. Spengler, J. J., in his two articles on "Birth Prevention in France" (*Marriage Hygiene*, May and August, 1936) gives an excellent and thoroughly documented account of the part played by various techniques of family limitation in depressing the French birth rate, the whole development being treated in its social context. A cursory account is also given by Chachuau, M., in *Le Mouvement du "Birth Control" dans les Pays Anglo-Saxons*, Paris, 1934, pp. 461-465. Giroud's account is written from the point of view of a protagonist of birth control. Accounts by antagonists are given in Bertillon, J., *La Dépopulation de la France*, Paris, 1911, and de Félice, R., *Les Naissances en France*, Paris, 1910.

be seen from the literature of the period, the objections to the existing laws were based on a realistic analysis of the ineffectiveness resulting from excessive severity. Concerning the position in France, Michel Raiter wrote, "as in the case of infanticide, the jury retreats from the severity of the law,"¹³ and Joseph Reinach, speaking in the *Chambre* on December 21st, 1909, said, "There is another reason which explains the indulgence of our juries in abortion cases; it is the excessive severity of Article 317 of the penal code which sentences to penal servitude (*réclusion*) . . . not only the midwife or doctor who performs the abortion, but also the girl or woman who aborts herself. . . . Abortion must be changed from a crime to a misdemeanour ("*Il faut correctionnaliser l'avortement*")."¹⁴ Between 1881 and 1910, of the cases brought to trial, sentences were given in fewer than 30 cases per year, and under 37 per cent of the persons prosecuted were actually sentenced. Even when the accused were found guilty, the jury generally admitted "extenuating circumstances." This finding was, in fact, true of over 80 per cent of the sentences between 1880 and 1910, so that in practice the juries generally refused to implement the law which had been created for suppressing abortion.¹⁵ Clearly, public opinion was against imprisonment for abortion.

As has already been remarked, the transformation of the abortion law occurred earlier in Belgium than in France. In the former country this transformation was easier to obtain because there was a desire to revise the whole penal structure, a desire linked up with the gaining of national independence. Nevertheless, there was, in France, a considerable agitation for legal reform, though it did not have any effect until after the last war. In 1891 Georges Trouillot laid a bill before the *Chambre des Députés*, proposing to "correctionnalise" certain kinds of abortion cases, but

¹³ Raiter, M. M., *Avortement Criminel et Dépopulation*, 2nd edn., Paris, 1925, p. 113.

¹⁴ Achard, M., *L'Avortement et la Propagande Anti-Conceptionnelle* (Doctoral Thesis, University of Toulouse), Toulouse, 1917, p. 51.

¹⁵ Raiter, M. M., *op. cit.*, pp. 113 and 116. Allemane, F., in *L'Avortement Criminel*, Carcassonne, 1911, pp. 167 *et seq.*, says that between 1881 and 1905 there were 1035 acquittals and only 600 sentences, and that among the persons sentenced the proportion for whom "extenuating circumstances" were found was 64 per cent in 1851-55, and 84 per cent in 1881-85, 81 per cent in 1886-90, 89 per cent in 1891-95, 86 per cent in 1896-1900 and 84 per cent in 1901-05. Du Moriez, S., in *L'Avortement*, Paris, 1912 (a book upon which most subsequent accounts appear to be based) states, p. 24, that the acquittal rate rose from 40 per cent before 1890, rapidly passing 70 per cent, to reach 81 per cent in 1908, "in spite of the continual care not to present cases to the jury unless obvious proof existed. In these verdicts of acquittal, the jury does not declare that the fact is not proved, but that it does not wish to punish it—undoubtedly because the penalty prescribed is too great."

the bill appears to have met with a poor welcome.¹⁶ In 1910 a new proposal was presented by Barthou, also aiming at transforming abortion from a crime to a misdemeanour, and attempting to suppress abortion propaganda.¹⁷ The same year (1910) saw the Lannelongue-Poirier Bill intended to cover not only the question of the legal treatment of abortion, but also abortion and birth control propaganda, while, on the positive side, it also outlined a system of encouragements to fertility.¹⁸ None of these proposals became law, though many of the clauses in the Lannelongue-Poirier proposal were implemented by the laws of 1920¹⁹ and 1923. Other, extra-parliamentary attempts were also being made to increase the effectiveness of abortion legislation, particularly after horrified attention had been stimulated further by the Thomas-Floury case of 1891.²⁰ Numerous books, articles and pamphlets were written on the subject, medical and social conferences were held to discuss the question, and such men as Bertillon, Benoît, Dumont, Levasseur, Leroy Beaulieu, and Bureau lent their weight to the attack.²¹ Other attempts went further. In 1900 the

¹⁶ The main change suggested was to retain the penalty of *réclusion* only for persons who "habitually procured the abortion of pregnant women," and to reduce the penalty for the women themselves to *emprisonnement* for one month to five years. See Floquet, C., *Avortement et Dépopulation*, Paris, 1892, *passim*.

¹⁷ The French laws of 1882, 1898 and 1908 were partly designed to prevent the advertisement of contraceptives and abortifacients (under the category of offences against public decency). But the Supreme Court (*Cour de Cassation*) decided on three occasions, of which one occurred in 1910 and another in 1912, that "the advertising of substances, medicaments or remedies intended either for procuring abortion . . . or for preventing conception, cannot, of itself, and independently of any obscene statement or description, constitute the offence for which provision was made in the law of 1898." (See De Roux, M., *L'État et la Natalité*, Paris, 1917, pp. 90-91, and Griolet, Vergé, Bourdeaux, *op. cit.*, pp. 621-622).

¹⁸ Garraud, P., and Laborde-Lacoste, M., *La Répression de la Propagande contre la Natalité*, Aix-en-Provence, 1921, pp. 7-11.

¹⁹ The 1920 law related to abortion and birth control propaganda. A more detailed discussion is given subsequently.

²⁰ The *Parquet* of the Seine, on the unexpected denunciation of a Mlle. Thomas, a professional abortionist who had learned her techniques by the reading of medical books in the library of her uncle, a country doctor, prosecuted 118 persons for whom Mlle. Thomas had procured abortions. Of these 118 persons, 65 benefited from a finding of no grounds for prosecution. The women were largely of the lower strata of the working class. Of the 53 for whom grounds were found, 11 were servants, 10 dressmakers, 5 cooks, 4 *concièrges*, and 5 bread carriers, butchers, daily servants, etc. See Floquet, C., *op. cit.*, and Talmeyr, M., *Sur le Banc*, 2^e série, Paris, 1892, section entitled "Les Avorteuses de Paris."

²¹ The suppression of abortion was part of the policy of the *Alliance Nationale pour l'Accroissement de la Population Française*, founded by J. Bertillon in 1896. (Three months after this had been founded, Paul Robin set up his counter organisation, "*La Ligue de la Régénération Humaine*," for advocating birth control and attacking the pro-natalists. (See Prevost in Balthazard, Dr., and Prevost, E., *Une Plaie Sociale, Les Avortements Criminels*, Paris, 1912, pp. 25, *et seq.*) The *Alliance Nationale* set up a Commission for studying the problem of French depopulation, and a report on the abortion question was published on behalf of this Commission by Drouineau, M., *Rapport sur l'Influence des Avortements Criminels sur la Dépopulation, et les Mesures à Prendre*, Melun, 1908. In July, 1909, the *Conseil National des Femmes Françaises* founded the *Ligue contre le*

Mayor of Tourcoing set up a "flying squad" to try to check abortion. A woman would pretend pregnancy and arrange for an abortion to be performed on her, and just as the abortion was about to begin a plain clothes detective would enter and catch the abortionist *in flagrante*. A number of such cases were obtained, but the Mayor of Tourcoing discovered that in French law an attempted abortion on a woman who was not pregnant was classed as an "impossible crime."²²

While the law in France was being evaded with the help of the juries, it was generally agreed that abortion was widespread and probably increasing in frequency towards the end of the nineteenth century. The trade of abortionist was practised fairly openly, the abortionists frequently being midwives, whose legal profession was to a considerable extent overcrowded.²³ The prices charged naturally covered a wide range, but working class women could obtain abortions for two francs and upwards. At the trial of Mlle. Thomas it was stated that the fees charged by this particular abortionist, who had been practising since 1869, ranged from five to twenty-five francs for the intra-uterine injections which she employed.²⁴ At the same time, self-induced abortions formed a very large class, perhaps the largest.²⁵ The frequency of criminal abortion was variously estimated—at 100,000 per year by Leroy-Beaulieu, at 185,000 by Balthazard, at 35 to 40 per cent

Crime d'Avortement, after protests to the Minister of Justice had proved useless. To increase their influence, they amalgamated with the *Association contre la Mortalité Infantile* in 1910, though retaining much of their own autonomy, and held a conference on abortion in Paris in 1911, with Dr. Balthazard as chairman and Eugène Prévost as principal speaker. The speeches were published in Balthazard & Prévost, *op. cit.*

²² De Roux, *op. cit.*, p. 81. Many writers proposed that attempted abortion should be punishable, even when the woman was not pregnant.

²³ Raïter, M. M., *op. cit.*, p. 134, cites a "well-known specialist" as saying of midwives that "when they are pretty, prostitution catches them; when they are plain or old, abortion supports them." The important part played by midwives was generally acknowledged, and many proposals for surveillance of midwives and maternity homes were made. Brouardel, P., *L'Avortement*, Paris, 1901, p. 49, wrote: "Of all the persons who practise abortion, midwives are by far the most numerous. . . . Not satisfied with procuring abortions for women who ask them to do so, some of them employ women who hunt for clients. . . . For many midwives, abortion is a real business, bringing them in far more money than the infrequent confinements for which their services may be requested. . . ."

²⁴ Brouardel, P., *op. cit.*, p. 49, says "the price of an abortion is, in fact, generally quite low, since the average is about 100 francs."

²⁵ Pelletier, M., *Le Droit à L'Avortement*, Paris, 1913, p. 9, says "the prices charged (by the abortionists) vary greatly; they range from 200 to 20 and even to 10 francs. I have been told of a place where abortions are procured for the latter, very low price; the waiting rooms are crowded from morning till night. But most of the abortions are not procured by such places; women have learned to abort themselves, and it is the current practice. The medical means of curing "delays" (in menstruation) are known to-day by everybody, and it may be said that, at least in the large towns, there is not a woman who has not used these means at some time or another. Mechanical methods are used with equal frequency; the long intra-uterine catheters which are displayed everywhere in herbalists' shopwindows are sufficient evidence of this. . . ."

of all conceptions by Dr. Doleris, and at 500,000 per year by Dr. Lacassagne,²⁶ as compared with about 850,000 live births per year. These estimates show considerable discrepancies, as is only to be expected in a field in which accurate measurement is impossible. In fact, as indications of even the approximate frequency of abortion, these estimates are merely informed guesses, but there is sufficient evidence to support the thesis that abortion was very widespread, at least in France,²⁷ at the end of the nineteenth century, and also that its frequency was probably increasing.²⁸

It is this background which must be borne in mind when considering the reasons for the French law of 1923, and in terms of this background it is clear that the essential change in the law was not primarily a more humane but a more efficient treatment of abortion cases. For this reason the "correctionalisation" of the offence removed it from the hands of the juries and transferred it to the Tribunals, where it was to be dealt with by magistrates. Severity of punishment was sacrificed to a decrease in the acquittal rate of persons accused of practising abortions on themselves and others.

It should also be noted that in both France and Belgium the attack on abortion has been accompanied by laws against contraceptive propaganda, clearly indicating that at least in recent times, the object of suppressing abortion has been primarily to prevent a further decline in fertility and not to dispose of a

²⁶ Lacassagne, *Le Matin*, 21st December, 1910, made a careful estimate based on his inquiries in Lyon, and allowing for lower figures in the rural districts. Berthélemy, H., *De la Répression de l'Avortement Criminel*, Paris, 1917, p. 5, footnote 2, gives the following estimates: R. Monin, 100,000 abortions per year in Paris alone; Budin, 185,000 per year in France; Dr. Landroy, late President of the *Société de Médecine*, more abortions than births (during the war); the *Société Obstétricale de France*, a third of all conceptions.

²⁷ As regards Belgium, Vicomte Terlinden, *Procureur Général*, in "La Lutte contre l'Avortement," *Bulletin des Arrêts de la Cour de Cassation*, October, 1924, says, discussing an abortion case in which he had prosecuted, "it was a case concerning a matron and a number of married women in a small town in the Walloon district of Brabant, and I learned on this occasion the distressing fact that even then—it was between 1886 and 1891—abortion was the current practice used by so-called respectable families for keeping down the expenses of the household."

²⁸ Berthélemy, H., *op cit.*, p. 7. "This feeling (of fear of the results of abortion) has disappeared. To-day a woman can have an abortion as easily as having a tooth pulled. It is nothing; it is done so quickly and with so little risk! This is whispered about in the workrooms. It is known to all classes of society, and the ill spreads." Lacassagne, *op. cit.*, "Twenty or thirty years ago, abortion was practised at a rather advanced stage of pregnancy, when the woman had become sure of her condition, after the third month. . . . Pasteur, by showing the need for anti-sepsis, indirectly stimulated (*favorisé*) the frequency of abortion. Practised at a period closer to the actual conception, abortions rarely present any complications, or immediate danger. The result has been a really alarming frequency of these abortions, and we may say, without fear of being contradicted, that there are more abortions than births." Edwards, Mlle. Blanche, *Bulletin de la Société d'Anthropologie de Paris*, 1890, meeting of 6th November, "among the working class, to abort a foetus before the third month (of pregnancy) is not much more significant than taking a purgative. . . ."

practice which is usually assumed to have deleterious effects upon women's health.²⁹ Arguments stressing post-abortive complications—and they are often found in newspapers, periodicals and other French and Belgian literature—are not the primary ones which motivated the change in legislation. Birth control and abortion legislation are merely two sections of the extensive system of measures designed to encourage fertility, and cannot properly be considered independently of the system as a whole.

Since birth control legislation in France and Belgium has important reactions on the abortion question, it is relevant to summarise the main clauses of the French law of 31st July, 1920, and of the Belgian law of 20th June, 1923. The French law³⁰ prescribes the following penalties—

(a) Imprisonment (*emprisonnement*) for 6 months to 3 years, and a fine of 100 to 3000 francs for anyone who incites to the crime of abortion, even if this incitement does not lead to any result.³¹

(b) The same penalties for anyone engaged in the sale or distribution of any articles, knowing that they are intended to commit the crime of abortion, even if there is no subsequent abortion or attempt at it, or if these articles could not in fact cause an abortion.

(c) Imprisonment (*prison*)³² for 1 month to 6 months, and a fine of 100 to 5000 francs for anyone who, for the purpose of birth control propaganda, divulges or offers to divulge, or who facilitates the use of methods for preventing pregnancy.

²⁹ In most countries and at most periods there have been pro-natalist policies directed at encouraging marriage and the raising of large families. The neo-Malthusian movement of the nineteenth century is an exception to the general historical trend. In France, in particular, pro-natalist policies have been frequently applied in the past—and are being applied on a much more intensive scale at the present—though with little apparent success, since they did not succeed in countering the evident desire on the part of the population for relatively small families. But it would be an untrue simplification of the position to dismiss the matter in this way; the whole economic and social context of a civilisation has to be evaluated before it is possible to decide why given measures fail. For the purpose of the present article, it may be noted that the semi-official (e.g. municipal) encouragement of birth-control in the first half of the nineteenth century was severely shaken by the Franco-Prussian war, which was followed by an intensive pro-natalist campaign. Similarly, a further impetus to pro-natalism was given during the last war, and the policy is now an official one. For a history of the French population policies, see Schöne, L., *Histoire de la Population Française*, Paris, 1893. A previous work by the present writer, *The Struggle for Population*, London, 1936, contains a survey of present French policy, and a forthcoming study, *European Population Movements and Policies*, will contain a survey of historical attempts to encourage population growth.

³⁰ Garraud, P., and Laborde-Lacoste, M., *op. cit.*, pp. 17, *et seq.*; and Bourdeaux, H., *op. cit.*, p. 155.

³¹ Section (a) in the Act describes in detail the possible ways in which a person may, publicly or privately, incite to abortion.

³² Apparently (Garraud and Laborde-Lacoste, *op. cit.*, p. 53), the term *emprisonnement* should have been used as in section (a).

(d) The penalties of (c) also apply to anyone who, using the means specified in article 23 of the law of 29th July, 1881,³³ engages in birth control or anti-natalist propaganda.

(e) If abortion follows any of the acts or practices described in section (b), Paragraph 317 of the penal code is applicable to persons engaged in such acts or practices.³⁴

Although this law was merely the culmination of a whole series of partial attempts to check birth control and abortion propaganda, its actual passage appears to have been somewhat of a surprise. According to Humbert, it took exactly nine days to be drawn up, passed through the committee stages and voted on by the *Chambre* and the *Sénat*.³⁵ It was proposed as an emergency measure, and was rushed through without observing customary parliamentary procedure.³⁶

The Belgian law of 1923 added a number of clauses to Paragraphs 383 and 384 of the penal code,³⁷ and prescribed that the penalties of imprisonment (*emprisonnement*) for 8 days to 6 months, and a fine of 26 to 500 francs,³⁸ originally prescribed for offences against public decency, should also apply to—

(a) anyone who, by any kind of publicity, advocates (*préconise*) the use of any means for procuring abortions, who indicates the way in which they may be obtained or should be used, or who gives information concerning the persons who administer such means, with the aim of recommending these persons.

(b) anyone who engages in the manufacture, distribution

³³ This law relates to the freedom of the press, and article 23 outlines the various means of publicity—speeches, shouts, threats at public meetings or in public places, documents, printed matter which is distributed or sold, put on sale or displayed at public meetings or in public places, etc.—which, if a crime or attempted crime follows, shall cause the person who made use of such means of publicity to be regarded as accomplices. (Griolet, Vergé, Bourdeaux, *op. cit.*, p. 598.)

³⁴ That is, anyone engaged in the sale or distribution of abortifacients shall be treated as an abortionist if an abortion ensues. There is also a section relating to secret remedies and applying the penalties of (c) if these secret remedies are designated as means of preventing pregnancy.

³⁵ Eugène Humbert, in *La Grande Réforme*, May, 1932. Humbert, who edits and largely writes this monthly paper, was closely associated with Paul Robin and the birth control movement of the end of the nineteenth century, and still largely directs what is left of this movement to-day in France.

³⁶ Alfred Fabre-Luce in *Pamphlet*, 12th May, 1933. (This paper, which supported birth control, ran for a very short time. The same is true of *Le Problème Sexuel*, which was produced by Madame Albrecht.) It should be noted, however, that most of the clauses in this Act had already been discussed fairly thoroughly, since they formed part of the Lannelongue-Poirier Bill, large sections of which had already been passed by the *Sénat*. (Garraud, P., and Laborde-Lacoste, M., *op. cit.*, p. 11.)

³⁷ *Codes Edmond Picard, op. cit.*, p. 34. The clauses are summarised.

³⁸ Increased in the same way as the fines under paragraphs 348 to 353, concerning abortion.

or publicizing of any drugs or instruments specially intended for procuring abortions, or advertised as such.

(c) anyone who displays or distributes goods (*objets*) specially intended for preventing conception, or who causes the advertising (*aura fait de la réclame*) of such goods in order to encourage the sale of them.

(d) anyone who, with a view to profit, encourages the desires of others by displaying, selling or distributing literature which gives information concerning the methods of preventing conception, advocates the use of such means, or indicates the manner in which they may be obtained or used.

(e) anyone who with a view to trade or distribution, engages in the manufacture, importation, distribution or advertising by any kind of publicity, of the literature implied in section (d).

As in France, the underlying motive for this change in the law was the attitude to the declining birth rate. In an address given by Vicomte Terlinden, *procureur général*, in 1924, this aspect was stressed to the exclusion of almost all other questions.³⁹

If the French and Belgian laws were effective in practice they would almost certainly lead to the adoption of *coitus interruptus* and the use of the safe period as the commonest means of regulating pregnancy. In fact, the laws seem much more ominous than they really are. In the first place, neither country legally defines the condom as a contraceptive but as a protection against venereal disease.⁴⁰ One of the most commonly used contraceptives thus remains outside the provisions drawn up by the law. Secondly, even in France it is not quite clear if all other forms of contraceptives come within the sphere of the law. Certainly, the sponge is not on the prohibited list, and Monsieur Paul Bogelot, a lawyer who has obtained the acquittal of various clients charged with selling pessaries, etc., believes that the law allows the simple

³⁹ Terlinden, *op. cit.*, pp. 1-5. Vicomte Terlinden said that the falling birth rate in France meant that France was committing suicide, and added that Belgium was committing suicide by the same means. He mentioned that it was through cognisance of this fact, and of the factors giving rise to it, that the Belgian parliament passed the Bill, introduced by Count Carton de Wiart, to amend paragraphs 383 and 384 of the penal code. In the rest of his address, the speaker stressed the inadequacy of the existing law—the new law had not been applied in many cases, and the abortion law was largely ineffective, in spite of the fact that the *procureur* had the power to send accused persons for trial in a magistrate's court, instead of before a jury—and urged the repeal of the "professional secret" of doctors in cases of abortion. He said, "not until . . . the medical secret is repealed, and by this repeal we are enabled to reach the maternity homes and effectively scrutinise the midwives and the *accoucheuses* . . . will the evil be exorcised." (P. 12.)

⁴⁰ This is true of all the countries concerning which information has been obtainable.

sale of contraceptives and only prohibits propaganda in favour of birth control.⁴¹ There is, in any case, a large legitimate sale of douches and a small clandestine sale of pessaries in France.⁴² In Belgium the significance of the law is even less clear. Scientific works on contraception do not, according to the decision of the Belgian Supreme Court of Appeal on 7th December, 1931, come within the scope of the law. Further, it would appear that only those propagandists who have a profit motive, and only those commercial dealers who indulge in propaganda or display, can be touched by the law. The Belgian birth control movement, organised by Marc Lanval, manages to escape prosecution, and has a membership of about 10,000.⁴³ According to Lanval, the net result of the 1923 law is that "in practice the benefit of contraception remains without hindrance for those who know—i.e. the upper classes—but the poor are not even aware of the subject."⁴⁴ The effect of the anti-birth control legislation in France and Belgium is thus probably to make it difficult for people to obtain contraceptives but certainly not completely to prevent their use.⁴⁵ This factor of hindrance, combined with the existence of large Catholic elements in the French population and a Catholic majority in the Belgian population, explains the success which meets books or pamphlets describing the "safe period" method. One such book,⁴⁶ originally published in 1935, is estimated to have sold well over 600,000 copies by July, 1937.

The restrictions imposed on the birth control movements in France and Belgium give a *prima facie* case for believing that the result would be largely to destroy any useful elements contained in the abortion laws of 1867 and 1923. The available evidence supports this view. Of the position in Belgium, Lanval says "it is generally accepted that 55 to 60 pregnancies out of a hundred are interrupted artificially,"⁴⁷ while Dr. Keiffer estimated that between 1st January, 1919, and 31st December, 1923, there were between

⁴¹ Spengler, J. J., *op. cit.*

⁴² Soluble pessaries are advertised in at least one French paper.

⁴³ Information given in private correspondence.

⁴⁴ In *Marriage Hygiène*, May, 1937.

⁴⁵ French law seems to be fairly strict as regards assiduous propagandists. For example, Jeanne Humbert, wife of the Editor of *La Grande Réforme*, was sentenced in 1934 to three months' imprisonment and fined 100 francs for quoting a sentence from a book of Victor Margueritte. The book had already sold 45,000 copies without any attempt to bring the author to trial. (*Le Problème Sexuel*, November, 1934.)

⁴⁶ Marchal and Méro, *La Liberté de la Conception*, Lille, 1935. Many books on the "safe period" have been published in France and Belgium, including at least one written by a Catholic priest—Father Mayrand, O.P., "*Un Problème Moral : La Continence Périodique dans le Mariage, suivant la Méthode Ogins*," Coublevie (Isère), 1934. See also *Mariage et Natalité* (Report of the Congrès de la Natalité), Bruxelles, 1932, *passim*.

⁴⁷ *Marriage Hygiène*, *op. cit.*

750,000 and one million abortions. In the same period there were 749,470 confinements, and the courts prosecuted only 3323 abortion cases and sentenced only 283 persons.⁴⁸ Mlle. Tilla Vulhopp, a serious student of Belgian population movements, estimates abortion frequency at 150,000 to 200,000 per year, as compared with about 150,000 births per year.⁴⁹ In France the present situation is very similar; even those who support the present law admit that it is ineffective. The *Alliance Nationale contre La Dépopulation*,⁵⁰ in a tract *Sur l'Avortement*, published in January, 1937, asserts that "in the large towns there are more abortions than births, and they are spreading into the rural districts; it would be an understatement to say that there is one abortion for every two births in France." The pamphlet proposes that the law should be more stringently applied and suggests a method similar to that used by the Mayor of Tourcoing in 1900, substituting, however, a pregnant woman to avoid the question of an "impossible crime." Speaking at the 1937 Medical Conference on fertility, M. Risler, President of the *Conseil Supérieur de la Natalité*,⁵¹ said, "It is estimated that the figures (of abortions in France) range between 300,000 and 500,000 per year . . . and I believe that the latter is closer to the truth."⁵² Similar estimates of the amount of abortion are quoted by the authors of the "Clamamus Bill" for modifying the laws of 1920 and 1923, the estimates deriving from Professors Mauclair and Audibert,⁵³ while Dr. Jean D'Alsace, who was for many years associated with the sexual reform movement in France, says that "from very reliable information I can estimate that in Paris there are at least 125 abortions for every 100 births."⁵⁴ Eugène Humbert, in a conversation with him, expressed the belief that quite apart from the professional practice of abortion, there are a great many self-induced abortions, intra-uterine injections being commonly used, and also that urethral catheters, sold nominally for the treatment of venereal disease, are employed by women to produce abortion.

⁴⁸ Memorandum of the Belgian Ministry of Health, n.d.

⁴⁹ *National Life*, May, 1931.

⁵⁰ This is the present name of the *Alliance nationale pour l'accroissement de la Population*.

⁵¹ This body, which is attached to the Ministry of Health, was set up immediately after the war. It studies the various problems which are associated with the main question of fertility.

⁵² *La Médecine Générale Française*, March, 1937.

⁵³ *Proposition de loi tendant à organiser la protection sociale de la maternité et de l'enfance*, etc., 2nd reading, 31st March, 1933.

⁵⁴ In a private letter of 4th October, 1937. In a conversation in August, 1937, Humbert claimed that among the girls working in department stores in Paris, he knew of many cases of girls having 2 or 3 abortions a year. In the supplement to *La Grande Réforme*, May, 1938, Humbert asserts that there are 800,000 abortions per year in France.

Certainly, the methods of procuring abortion are common knowledge. A book by G. Hardy, undated but apparently written about 1914, gives a detailed account of the various methods and of the precautions to be taken. This book is sold clandestinely, but there is no great difficulty in obtaining it, and some hundreds of thousands of copies are reputed to have been sold.⁵⁵

Some interesting information on the prevalence of abortion in France is given in reports made by the departmental sections of the *Conseil Supérieur de la Natalité* in 1937.⁵⁶ Of the *Département du Nord*, it was said that abortions were as frequent in the rural districts as in the towns, and the *procureur de la République* for Hazebrouck asserted that "the practice of abortion is spreading increasingly in this *arrondissement*, especially in the rural areas where the population, previously rather ignorant of the practice, to-day seems very well acquainted with the methods which can be used." According to the *procureur* for Valenciennes, conditions in his area showed a high frequency among the working class, especially the Polish immigrants. The figures given for Lille show the paucity of prosecutions and sentences under the 1923 law. Between 1932 and 1936 only 70 cases were prosecuted and only 26 persons were sentenced. The magistrates in the *Département* generally believed that the "correctionalisation" of abortion had been a valuable change, but agreed that the law was not carried out effectively, and a number of witnesses suggested that the 1923 law should be amended to dispense with the obligation of proving pregnancy in order to prosecute abortionists.⁵⁷ Considerably more information was given for the *Département de la Seine Inférieure*, for which it was estimated that there were 10,000 abortions per year, as compared with about 18,000 live births, and that since 1922 there had been about 150,000 abortions. In the towns the abortion rate is much higher, while there are still rural districts where abortion is practically unknown. The author of the report on the *Seine Inférieure* believes that there is a close connection between abortion and the employment of women, especially of married women, only partly associated with the fear of being dismissed on account of pregnancy, and concludes that "the employment of women is, in any case, anomalous, the employment of married women is imprudent, and that of women who have children

⁵⁵ *La Question de Population et Le Problème Sexuel, contenant une Étude sur l'Avortement, sa Nécessité, ses Procédés, ses Dangers*, originally entitled *L'Avortement, sa Nécessité, ses Procédés, ses Dangers*, published 1914. According to Himes, N. (*Medical History of Contraception*, London, 1936, bibliography), "Hardy" is the pseudonym for Giroud, author of *Paul Robin*.

⁵⁶ The *Conseil Supérieur* is attached to the French Ministry of Health.

⁵⁷ Maurice Gand, *Rapport sur les avortements criminels dans le Département du Nord*, 1937. (In typescript.)

is monstrous."⁵⁸ In summing up, Dr. Siredy emphasised two courses of action generally believed to be necessary for checking abortion—the more effective application of the existing law, and the provision of substantial material assistance in respect of children in order to decrease the disadvantages of child-bearing and rearing—and indicated that there appeared to be a general acceptance of J. L. Faure's thesis, "If the State wants children, let it pay for them."⁵⁹

FRANCE⁶⁰

PROSECUTIONS UNDER PARAGRAPH 317 OF THE PENAL CODE AND UNDER THE
LAW OF 31ST JULY, 1920.

Year		Number of		Results of Prosecutions —Persons Sentenced to			Fined only
		Cases	Persons Involved	Acquitted	Imprisonment of over 1 year	Imprisonment of 1 year or less	
Paragraph 317 of the Penal Code	1925	192	434	75	79	269	11
	1926	199	400	98	82	206	14
	1927	198	408	101	83	212	12
	1928	195	394	90	91	202	11
	1929	246	529	83	54	381	11
	1930	171	395	73	48	263	11
	1931	163	381	77	34	262	8
	1932	171	395	57	49	281	8
	1933	158	352	61	26	256	9
	1934	143	301	78	23	197	3
Law of 31st July, 1920	1927	8	10	—	—	8	2
	1928	3	9	2	—	3	4
	1929	3	4	1	—	3	—
	1930	4	6	1	—	5	—
	1931	18	21	7	—	10	4
	1932	6	11	3	—	8	—
	1933	15	24	1	1	13	9
	1934	15	16	4	—	10	2

The data on France and Belgium are sadly lacking in precision, but they make abundantly clear the fact that in neither country has there been any apparent success in checking abortion. On the one hand the anti-birth control laws are largely ineffective, at least as far as they can be judged from the number of prosecutions and sentences.⁶¹ (See accompanying Tables.)

⁵⁸ A. Cauchois, *Rapport de la Commission de la Natalité de la Seine Inférieure*, 1937. (In typescript.)

⁵⁹ A. Siredy, *Rapport Général sur la Répression de l'Avortement*, 1937. (Ministère de la Santé Publique, XIV^e Congrès des Commissions Départementales de la Natalité.)

⁶⁰ The statistics for France and Belgium have been obtained through the kindness of the Ministers of Justice of these countries.

⁶¹ Mlle. Blanchier, in the *Bulletin de l'Association Française des Femmes Médecins*, December, 1933, said "as regards contraceptive prophylaxis the French law aims only at propaganda and respects freedom of thought and scientific discussion. The judgments and sentences are few, and the law rather variable in its application, but to warrant a prosecution there must be propaganda, and to

BELGIUM

NUMBER OF PERSONS PROSECUTED UNDER PARAGRAPHS 348 TO 353 (ABORTION)
AND THE LAW OF JUNE 20TH, 1923.

Year	Paragraphs 348-353				Law of 20th June, 1923	
	Magistrates' Courts ⁶² Accuited Sentenced		Higher Courts ⁶³ Accuited Sentenced		Magistrates' Courts Accuited Sentenced	
1926	10	81	—	—	1	4
1927	17	106	—	3	—	7
1928	27	80	—	—	—	1
1929	18	57	1	1	2	1
1930	16	52	—	—	—	2
1931	12	55	—	—	—	—
1932	13	70	—	—	1	—
1933	25	37	—	—	—	2
1934	22	48	—	—	—	—
1935	15	48	—	—	—	8

Yet by hindering the spread of birth control information they compel women to have recourse to abortion, the large bulk of which is untouched by the courts.⁶⁴ By hypothesis the officials in France and Belgium cannot advocate birth control, even though many of them believe that where birth control knowledge spreads, abortion tends to decrease in importance. They are thus driven to urge the more stringent application of the existing laws, as a negative measure, and the encouragement of fertility as a positive one.⁶⁵ But the available evidence shows that, so far, the French and Belgian schemes of encouragement to families have had little, if any, effect; certainly, they do not seem to have reduced the number of abortions. It is, of course, extremely difficult to judge whether or not a given social measure designed to raise fertility is really ineffective, since its quotient of effectiveness may consist simply in slowing down the rate of decline. For France, however,

warrant a sentence there must be proof of propagandist intentions." As regards Belgium, Father V. Fallon, a noted authority on Belgian demography, said, in a letter to the present writer (June, 1938): "In any case it is certain that the law does not achieve its aim, or does so only imperfectly. . . . As regards the distribution of contraceptives, the prohibition applies only to propaganda carried on with a view to profit, to display or to distribution. The discreet sale (of contraceptives) is not prohibited. Advertisements, insertions in the newspapers, usually escape prosecution because they are made in general or vague terms, which are understood by the 'knowing' public, but which evade suppression."

⁶² *Tribunaux correctionnels*.

⁶³ *Cours d'Assises*—cases tried by jury.

⁶⁴ This is clearly the case even in France, where the acquittal rate in abortion cases has fallen very greatly since the change in the law.

⁶⁵ An inquiry made by the *Association Française des Femmes Médecins* produced the following conclusions: "First, there must be an attack on the main causes of abortion. Secondly, the public must be taught the dangers of abortion. Thirdly, the law must be applied rigorously and with severity." There was apparently no desire to increase the penalties for abortion. (*Bulletin de l'Association* . . . , January-March, 1937.)

it has been possible to make a closer analysis for the year 1931, by which time family allowances and other forms of assistance were fairly widespread, though they had not yet been made compulsory. The allowances were given almost exclusively to industrial workers and employees, and on this basis a correlation analysis was undertaken. For those *Départements* in which the proportion of males engaged in industry was above the average for all *Départements*, the fertility (in the form of gross reproduction rates) of the *Départements* was correlated with the percentage of wage earners and employees enrolled in family allowance schemes. The coefficient of correlation was $-.068 \pm .164$, which is insignificant, and though the correlation suffers from a number of unavoidable crudities, the small size of the coefficient is fair evidence of the absence of association between family allowances and fertility in 1931. This does not mean that material assistance is bound to be ineffective. But it would imply that effectiveness would require, apart from other factors, more substantial monetary inducements than were being offered in 1931. This fact is fully recognised in both France and Belgium by the associations which are campaigning against the continued decline in the birth rate.

As regards Germany a good deal of attention has been drawn to the recent rise in the birth rate of that country, and analyses of the factors responsible for this rise generally lay considerable emphasis upon the reduction in the frequency of abortion. Some data relating to the fall in abortion frequency are given in a previous study by the present writer,⁶⁶ and are summarised, together with some new material, in the following Table.

TOTAL ABORTION FREQUENCY SHOWN BY THE RECORDS OF THE SICKNESS⁶⁷ FUNDS OF DRESDEN, BERLIN (A.E.G.), AND LÜBECK AND OF THE MUNICH WOMEN'S CLINIC AND MIDWIFERY SCHOOL.

	<i>Number of Abortions</i>	<i>Number of Normal Births</i>	<i>Number of Abortions per 100 Normal Births</i>
1930 .	3705	8267	44·8
1931 .	3079	6843	45·0
1932 .	3119	5864	53·2
1933 .	2468	5472	45·1
1934 .	2232	7328	30·5

⁶⁶ *The Struggle for Population*, London, 1936, Chapter II.

⁶⁷ The data for Dresden and Berlin (*Allgemeine-Elektrizitäts-Gesellschaft*) are from Glass, *op. cit.*, p. 30, where the relevant documentation is given. The data for Lübeck are from Hillmann, "Die Fehlgeburten in Lubeck im Jahre, 1935," *Reichs-Gesundheitsblatt*, 17th June, 1936, and for Munich from Ploetz, A., "Geburten und Abortusfälle," *Archiv für Rassen- und Gesellschaftsbiologie*, 2, 1936 (July).

Even more striking figures are given for Berlin (*Allgemeine Ortskrankenkasse*) by Burgdörfer.⁶⁸

	Number of Abortions	Number of Normal Births	Number of Abortions per 100 Normal Births
1929	6100	5900	103.4
1935	3654	21780	16.8
1936	3619	22405	16.2

Various reasons are given for this decline in abortion, though of course it is impossible to tell how far the figures give any real indication of the change in the position.⁶⁹ The explanation of the figures lies partly, at least, in the fact that under the National-Socialist régime abortions are notifiable, and at the same time the courts have been ordered to apply the existing law with greater stringency.⁷⁰ Consequently, whereas in former times women

⁶⁸ The figures for 1929 and 1935 are from Burgdörfer, F., in Kühn, A., Burgdörfer, F., and Staemmler, M., *Erbkunde, Rassenpflege, Bevölkerungspolitik*, Leipzig, 1936, p. 277. Those for 1936 are from Burgdörfer, F., *Völker am Abgrund*, 2nd edn., Munich-Berlin, 1937, pp. 32-33. The abortions recorded are designated as "miscarriages" (*Fehlgeburten*), but are generally regarded as being almost exclusively induced and not spontaneous. On this point see the statement by H. Eymer in Ploetz, A., *op. cit.*

⁶⁹ Hodann, M., *History of Modern Morals*, London, 1937, p. 229, writes: "Of course, these Draconic laws (this must refer to the laws existing before 1933—see following footnote) failed to stop all illegal abortions in Germany. Even in 1934 many women travelled from Denmark to Berlin in order to have the benefit of a wider choice of doctors and facilities than Copenhagen could offer. And the Scandinavian Exchange was more persuasive than all the moral fervour of the Berlin Medical Council."

⁷⁰ Under Article 12 of Order No. 4 for administering the *Gesetz zur Verhütung erbkranken Nachwuchses*, every interruption of pregnancy or miscarriage (abortion) occurring before the completion of the 32nd week of pregnancy, or premature birth, must be notified in writing to the competent medical officer within three days. The persons responsible for this notification are primarily the doctor or midwife called in to help. But anyone else called in to help (except relatives or persons in the same household as the pregnant woman) is also liable to inform the medical officer if no doctor or midwife has been called in. (*Reichsgesetzblatt*, 25th July, 1935, p. 1037).

The abortion law itself has not been made more stringent. The modern German abortion law derives from the code which came into force for the newly established German Empire on 1st January, 1872. Paragraphs 218 to 220 prescribed the following penalties: (a) for a woman who has an abortion or has her foetus destroyed in the womb, penal servitude up to 5 years, though this may be reduced to a minimum of 6 months if there are extenuating circumstances (the minimum for penal servitude—*Zuchthaus*—is one year; see Von Liszt, F., *Lehrbuch des Deutschen Strafrechts*, 22nd edn., ed. E. Schmidt, Berlin-Leipzig, 1932, Vol. I, p. 386.) (b) the same penalties for the person who administers, with the consent of the woman, the means resulting in abortion or in the destruction of the foetus in the womb; (c) penal servitude up to 10 years for anyone administering, for money, the means resulting in abortion or in the destruction of the foetus in the womb; (d) penal servitude for not less than 2 years for anyone administering, without the knowledge or consent of the woman, means resulting in abortion or in the destruction of the foetus in the womb. If death ensues, the penalty shall be penal servitude for not less than 10 years, or for life. (See Drage, G., *The Criminal Code of the German Empire*, London, 1885, p. 249.) In 1926 the law was modified, largely as a result of pressure by the Socialist Party (see Hodann, M., *op. cit.*, p. 228, and von Ungern-Sternberg, R., *The Causes of the Decline in the Birth Rate within the European Sphere of Civilisation*, Long Island, N.Y., 1931, p. 148) in the following way: (a) imprisonment—1 day to 5 years—for a woman having

generally saw their panel doctors for the treatment of post abortive complications, the tightening up of legal practice probably reduces the number of women who are prepared, in view of the risks involved, to seek medical treatment.

LÜBECK

	MARRIED WOMEN			UNMARRIED WOMEN		
	No. of Abortions	No. of Normal Births	No. of Abortions per 100 Normal Births	No. of Abortions	No. of Normal Births	No. of Abortions per 100 Normal Births
1932	758	1373	55.2	278	218	127.5
1933	531	1426	37.2	204	180	113.3
1934	530	1992	26.6	183	190	96.3
1935	582	2124	27.4	159	226	70.4

It is certain, however, that abortions have been reduced to some extent in Germany, though the actual change cannot be measured. And in so far as a reduction has taken place, it is probably due mainly to the introduction of marriage loans, and is consequently a reduction of abortions among unmarried or newly married women. For Lübeck some evidence of this is given in the above statistics.⁷¹ The differential trend between married and unmarried women in 1934 and 1935 gives some support to this view, and further support might be given if the data for married women could be subdivided by length of married life. The position is, briefly, that an unmarried woman who has become

an abortion, or for anyone procuring it for her, attempted abortion also to be punishable (as it was under the previous law); (b) if the abortion is performed without the consent of the woman, or for profit, the penalty is penal servitude—1 year to 15 years. The same penalty applies to anyone supplying, for profit, a pregnant woman with the means of procuring an abortion. If there are extenuating circumstances, the penalty may be reduced to not less than three months' imprisonment. (*Reichsgesetzblatt*, 25th May, 1926, p. 239.) Finally, under the *Gesetz zur Verhütung erbkranken Nachwuchses* of 14th June, 1933 and the amending Act of 26th June, 1935, if the court decides to sterilize a woman who is pregnant when the operation is to be performed, the pregnancy may be interrupted with the consent of the woman, unless the child is already capable of living or if the interruption of pregnancy would seriously endanger the life or health of the mother (*R.G.B.*, 1935, 1 p. 773). (Note that Article 2 of the Order of 18th July, 1935, for administering this Act, defines the killing of a child at birth as equivalent to interruption of pregnancy within the meaning of the Act (*R.G.B.*, 1935, 1, p. 1035).) Under Section 14 of the Act of 14th June, 1933, amended by the Act of 26th June, 1935, it is prescribed that "sterilisation or interruption of pregnancy which is not carried out in accordance with the provisions of this law . . . is only permissible when a medical practitioner performs the operation under recognised medical procedure, in cases in which the life or health of the person having the operation would otherwise be seriously endangered, and with that person's consent."

⁷¹ Hillman, *op. cit.*

pregnant is faced, on the one side, with the possibility of severe penal treatment, or on the other, with a marriage assisted by the interest-free loan of up to 1000 *Reichsmark*, to be repaid in just over eight years. Moreover, if the pregnancy goes to term, a quarter of the loan is cancelled. In these circumstances it is not unlikely that there will be a fall in the number of first abortions. Similarly, the fact that a further twenty-five per cent of the loan will be cancelled at the birth of each subsequent child, may act as a check on later abortions. But it will not encourage fertility to any appreciable extent, though there are other measures in Germany which, if they do not offer positive incentives, may perhaps reduce the unwillingness to have children. Frankly, it is too early to say with any certainty whether or not the German measures have made any fundamental change in the attitude to the bearing and raising of children, and, therefore, in the extent to which abortion will be practised. But it should be noted that there is already a strong extra-legal campaign against birth control,^{71a} and it is likely that this will soon be reinforced by legislative action.⁷² In the circumstances, it does not seem likely that a low abortion rate will be a characteristic of the present regime.

^{71a} Hodann, M., in a report on Germany (in *International Medical Group for the Investigation of Contraception*, 5th issue, London, 1934) says that as soon as the National-Socialists took over the government, they closed the Sex Advice Centres. He also quotes from the *Opferdienst der Deutschen Frau*, 5th May, 1933, the following statement: "The use of contraceptives means a violation of Nature, a degradation of womanhood, motherhood and love." As regards the campaign against abortion, he gives the following excerpt from the new rules of the Berlin Medical Council, issued 8th September, 1933: "Nazi ideals which have achieved victory demand that the practice of abortion which has taken root in Germany shall be exterminated with a strong hand. Women, inflamed by Marxist propaganda, claim the right to bear children only when they desire. First—furs, radio, new furniture, then perhaps one child. The Berlin Medical Council will not permit weak or malicious practitioners to counter the farsighted plans of the government for the future of the nation. . . . The Council warns all practitioners who may seek to save their practice in abortion by alleging that they only get cases in which abortion has already been attempted, that proceedings will be taken against every evil-doer who dares to injure our sacred healthy race."

⁷² Schaffstein, F., in *Angriffe auf Rasse und Erbgut* (in Gürtner, F., *Das Kommende Deutsche Strafrecht, Besonderer Teil*, 2nd edn., Berlin, 1936, pp. 115 *et seq.*) suggests this as a probable result of the Penal Law Commission, which recommended imprisonment, and in some cases penal servitude, for persons publicly urging or inciting to family limitation (apparently with special reference to propaganda for two-child families). Note that, according to information obtained from the Inter-departmental Committee on Abortion, the Act of 18th February, 1927, for the control of venereal diseases, restricts the advertising of means and apparatus for the cure or alleviation of venereal disease or, by a notice of the Propaganda Council of German Economy, 5th May, 1936, for the prevention or termination of pregnancy in women, to doctors, chemists, etc., authorised to trade in such means, etc., and to scientific journals appealing only to such professional circles. (By the Note of 5th May, 1936, the advertising of means, etc., for preventing or terminating pregnancy is allowed only after obtaining permission from the President of the Propaganda Council of German Economy.) Under the new Paragraphs 219 and 220 of the penal code, resulting from the Act of 26th May, 1933, and coming into force on 1st June of the same year (the old Paragraphs 219 and 220, which referred to abortion itself, were

The situation as regards abortion is fairly similar in the three Scandinavian countries, so they may be conveniently treated under one head.⁷³ In each of the countries there has recently been much concern with the question, and each country has had a governmental committee to report on the need for legal and other reforms arising from the problem.⁷⁴ It is from the reports of these committees that much of the following material has been taken.⁷⁵

The Danish committee had to consider the fact that although, under the penal code of 1930, the penalties for abortion had been considerably reduced, Danish juries were still refusing to sentence women for having undergone abortions. Between 1928 and 1932, only 82 women had been accused of having had abortions, and only 19 were brought to trial. Of these 19, 4 elected to be tried without a jury, and all four were convicted. But of the 15 who were tried by jury, 14 were acquitted, the remaining woman being sentenced because she was found guilty of infanticide. As against these few prosecutions, the committee estimated that there were between 1000 and 2000 criminal abortions per year, compared with about 66,000 births, and one member believed that the actual

repealed in 1926 when the abortion law was modified and the whole law compressed into Paragraph 218), the following penalties are prescribed: (a) a fine, or imprisonment for up to two years for anyone publicly advertising or recommending medicines, instruments or methods for procuring abortion, or displaying them in a public place (this does not apply if the medicines, etc., which are used for medically prescribed abortion, are advertised or recommended to doctors or in professional, medical or pharmacological journals); (b) a fine, or imprisonment for up to two years for anyone publicly offering his own or someone else's services for undertaking or furthering abortions (*Strafgesetzbuch*, Beck publications, 5th Edn., Munich-Berlin, 1938, pp. 76-77).

⁷³ The treatment of the Scandinavian countries in this paper is far too brief to do justice to their efforts to solve the abortion question. In particular, considerable attention should be paid to the discussion in each of the reports of the reasons why particular proposals were made by the different committees. Unfortunately, lack of space forbids more detailed discussion, but the present writer hopes, at some later stage, to take up the question again and consider the general problem of birth control and abortion in Western Europe, with particular reference to the social context in which the various laws have been passed and applied.

⁷⁴ The Norwegian committee was set up in 1934 and reported in 1935. The Danish committee was set up in 1932 and reported in 1936. In Sweden a committee, which was set up in 1934, reported in 1935, and its report was handed to the Population Commission, which published its views of this report in 1937. In addition, a special investigation into abortion in Sweden was undertaken by Dr. K. A. Edin, and the results published in 1934.

⁷⁵ The Danish report is *Betænkning afgivet af den . . . Kommission angaaende Lovligheden af Svangerskabsafbrydelse M.V.*, Copenhagen, 1936. The Norwegian report is *Instilling Nr. 1 fra den . . . Komite til Revisjon angående Forandring i Straffeloven § 245 og angående Utferdigelse av Lov om Avbrytelse av Svangerskap*, Oslo, 1935. For Sweden the first report is *Betänkande . . . till Lagstiftning av Avbrytande av Havandeskap*, Stockholm, 1935, and the second is *Yttrande i Abortifrågan . . .*, Stockholm, 1937. The Secretary of the Inter-Departmental Committee on Abortion was kind enough to supply the writer with translations or *présis* of large sections of these reports. See also Vasseur, P., "*La Protection de la Maternité au Danemark*" (*Mercure de France*, 1st July, 1937).

number of criminal abortions was more probably 6000. Dr. Axel Tofte, another member of the committee, estimated that the frequency of criminal abortions was between 2000 and 5000 per year, and that most of them were performed by doctors.⁷⁶ The committee felt that it had to strike a balance between an acceptance of the part played by abortion in everyday life, and the need to have some kind of penalty, since complete exemption would be attacked by a large section of the population. Apart, therefore, from its recommendations regarding social reform,⁷⁷ it urged that abortion be made legal on ethical,⁷⁸ eugenic, and social-humanitarian grounds. As a result of this report, the Danish law relating to abortion has again been changed. A new law, which was originally to come into force on 1st April, 1938, but which has now been postponed until 1st October, 1939, allows abortion on eugenic, therapeutic and ethical grounds.⁷⁹ Social grounds have been omitted—the Minister of Justice was antagonistic to their inclusion—but Section 2 of the Act envisages cases of legal abortion where “the danger to the life or health of the woman is not caused by disease,” and it is conceivable that this

⁷⁶ In an interview with him in September, 1937.

⁷⁷ It recommended improving the position of mothers, married or not, by maternity insurance and State aid. It also urged the establishment by the State (central and local authorities) of clinics where instruction in sexual hygiene could be obtained.

⁷⁸ That is, in case of rape, incest, intercourse with a feeble-minded woman, or by threat or fraud, or with minors.

⁷⁹ The Act was passed on 18th May, 1937. A complete English translation is given in the *Eugenics Review*, April, 1938. For infractions of the law the following penalties are prescribed: (a) a woman who has an abortion, performed by herself or by someone else who is not an authorised doctor to be sentenced—even if there are legitimate grounds for the abortion—to not more than three months' imprisonment though this may be dispensed with in particularly extenuating circumstances. (b) In cases of illegal abortions or attempted abortions, the man responsible for the pregnancy may be sentenced to not more than one year's imprisonment if it is proved that he refused to grant the woman reasonable personal or economic assistance, in spite of her request for it, and that this refusal was the main reason for the abortion or attempted abortion. (c) An authorised doctor who procures or helps to procure an illegal abortion shall be sentenced to not more than two years' imprisonment or, in aggravating circumstances, to not more than four years' imprisonment (minor infractions of the law receive much lighter penalties). (d) An unauthorised person may, in the cases falling under (c) be imprisoned for four or eight years as maximum sentences. Repeated offences may be punished by imprisonment up to twelve years. (e) If abortion is procured without the woman's consent, the penalty is imprisonment for two to twelve years. (f) Anyone illegally coercing or using threats or promises of reward to induce a woman to have an abortion, shall be punished, even if the abortion is performed under the prescribed conditions, to imprisonment for not more than two years, or for not more than four years if the abortion is performed by someone who is not a qualified doctor. Infractions of the law will be tried without jury. Under the penal code of 1930, a woman having an abortion might be punished with imprisonment for a maximum of two years, while the person procuring or helping to procure the abortion might receive not more than four years' imprisonment. (In aggravating circumstances this latter penalty could be increased to eight years, or, if the abortion had been procured without the consent of the woman, to imprisonment for two to twelve years.)

clause may embrace cases of "psychic injury" where economic circumstances are very poor.^{79a}

In Sweden, as in Denmark, there is considerable difference of opinion as to the frequency of abortion. Dr. Edin, on the basis of an inquiry undertaken by the Medical Board, believed that there were more than 10,000 criminal abortions per year.⁸⁰ Dr. Sundquist, who was a member of the 1934 committee, regarded 10,000 as a minimum figure.⁸¹ Professor Gunnar Dahlberg considers that a third of all illegitimate pregnancies and a sixth of all legitimate pregnancies are aborted, which would imply not less than 21,000 abortions in 1934.⁸² Finally, Madame Ottesen-Jensen, president of the only effective birth control organisation in Sweden, suggests that a figure of 50,000 abortions per year would not be an exaggeration of the actual position.⁸³ There is, however, general agreement that criminal abortions are not usually performed by doctors. Working-class women usually go to "quacks," or induce their own abortions, while the wealthier women are supposed to go to Copenhagen or Oslo to have their abortions performed by doctors.⁸⁴ The Swedish committee of 1934, like the Danish committee, recommended a fundamental reconstruction of the law relating to abortion.⁸⁵ It proposed the legalisation of abortion on

^{79a} This is confirmed by a letter (of August 29th, 1938) from Mr. H. H. Koch, of the Danish *Socialministeriet*, according to which "a doctor will be able to plead that the results of a further birth on the mental health of a woman who has six children and whose husband earns a very small wage, is a sufficient reason for a legal abortion." Apparently the reason for postponing the application of the new law is in order that the government may have sufficient time to carry through social reforms designed to reduce the economic and social motives which impel women to have abortions.

⁸⁰ Edin, K. A., *Undersökning av Abortförekomsten i Sverige under Senare År*, Lund-Malmö, 1934. A table on pp. 10 and 11 gives the results of an investigation made by sending questionnaires to all doctors, midwives, hospitals and institutions. The analysis shows a total of 10,445 abortions, 245 of which were therapeutic. Some of the remainder were certainly spontaneous, but there must also have been a considerable number of abortions at an early stage of pregnancy, which did not come to the notice of the various persons to whom the questionnaires were addressed. The 1935 report of the Swedish abortion committee (pp. 17 and 170) states that in one month of 1934, according to a questionnaire sent to all doctors—732 women asked doctors to perform abortions on non-therapeutic grounds. This would mean nearly 8800 in a year. There is, of course, no way of telling how many of these women eventually manage to obtain abortions, nor how many women who did not approach doctors also managed to have abortions. The average number of live births per year was about 87,000 in 1931-35.

⁸¹ In a discussion with the present writer in September, 1937.

⁸² In a discussion in November, 1937.

⁸³ In a discussion in September, 1937.

⁸⁴ This, however, was denied by competent persons in Oslo.

⁸⁵ The penal code, modified by the Act of 30th June, 1921, prescribes the following penalties: (a) imprisonment for a woman having an abortion; if the attempt is unsuccessful, imprisonment for not more than six months, or a fine. (b) Anyone helping to procure the abortion shall receive imprisonment for not less than six months, or hard labour for six months to two years. The maximum term of imprisonment is reduced to one year if the attempt is unsuccessful, and is increased, if an abortion is procured for gain or habitually, to hard labour for one to six years (not more than one year if the attempt fails). (c) If the woman has not

ethical, eugenic and social grounds. These proposals were then given to a committee of the Population Commission for consideration, and the social indications were excluded, mainly on the ground that it is better to provide social conditions which would enable women to bear children without thus being reduced to destitution, rather than to accept the possibility of destitution and allow women to have their pregnancies interrupted. On this basis a law was drafted, and was passed on 17th June, 1938, and under this law abortion is permissible on therapeutic, eugenic and ethical but not on social grounds.⁸⁶

In Norway, too, the committee set up to consider the question of abortion reported in favour of a fundamental modification of the law, making it permissible to procure abortions on medical, ethical, eugenic, humanitarian and social indications.⁸⁷ But, so far, no legislative action has been taken, and the penal code of 1902 still applies.⁸⁸ As regards abortion frequency, the committee estimated that there were between 3575 and 5425 induced abortions per year. But Dr. Gerda Evang, who is closely associated with the Oslo birth control clinic, considered that it was probably much higher. This conclusion is also suggested by an analysis of the annual reports of the Oslo birth control clinic.⁸⁹ The table below shows the number of past births and abortions reported by patients attending the clinic in the years indicated.

	<i>No. of Births reported</i>	<i>No. of abortions reported</i>	<i>No. of abortions per 100 births</i>
1931-34 .	3059	692	22.6
1934 .	1936	547	28.3
1935 .	2460	693	28.2
1936 .	2222	762	34.3

given her consent, the penalty shall be hard labour for six months to two years if the attempt fails; for six months to ten years if abortion results; for ten years or life if the woman is severely injured by the abortion, and for life if she dies. Therapeutic abortion was allowed, as in Denmark, though not expressly provided for.

⁸⁶ The law comes into force on 1st January, 1939. The penalties for infractions of the law, in cases where there are legal grounds for the abortion, but where abortion or attempted abortion is performed by an unqualified person, or for giving false information in reply to the inquiries specified by the law, are relatively mild, not amounting in any case to more than one year of imprisonment. But outside of these cases—that is, in cases of abortion on grounds not permitted by the law, of abortion without the consent of the woman, etc.—the existing penal code still appears to be applicable.

⁸⁷ Humanitarian and social grounds are linked together in one category. Presumably this category could include cases of "social suffering" which might arise with the birth of an illegitimate child.

⁸⁸ A woman having an abortion shall receive not more than three years' imprisonment. Anyone helping to procure an abortion shall receive not more than six years' imprisonment. (Not less than two years, if without the consent of the woman; and for life, or for not less than six years if the woman dies as a result of the abortion.)

⁸⁹ *Mødrehygiene Kontoret i Oslo, Beretning for 1924-34, 1934, 1935 and 1936.* The first line of the table covers the period 27th November, 1931 to 1st January, 1934. The remaining lines cover the single years indicated.

The upward trend of abortion is probably not genuine, but is based on a growing confidence of the patients in the clinic and an increasing willingness to give details concerning previous pregnancies. Assuming that the figure for 1936 is indicative of the situation in the whole of Norway, there would have been in 1935 about 14,360 abortions as compared with 41,870 births.⁹⁰

Some light is thrown upon the situation in Scandinavia by the facts concerning the development of the birth-control movement in the three countries for which abortion data have been given. It is commonly believed that modern contraceptive practices are widely spread in Scandinavia; in reality this belief is quite unjustified. In Denmark, according to Dr. Axel Tofte, there are still no birth control clinics, and advice on this subject is given almost exclusively by panel doctors. The State hospital in Copenhagen has an ante-natal clinic, and the clinic for women's diseases gives advice on birth control in cases where it is regarded as essential. There has, however, been considerable pressure from doctors to change this position,⁹¹ and particularly to repeal the law under which birth control propaganda is deemed an offence against public decency,^{91a} and under the law which was to come into force on 1st April, 1938, it is ordered that "clinics shall be established by public enterprise, wherein persons of both sexes shall have access to correct and warrantable instructions in sexual hygiene . . .," and "the advisory functions of the clinics . . . shall be performed by qualified doctors assisted by trained nurses." Finally, "it is incumbent on the counties to ensure that the clinics . . . be established in sufficient numbers before 1st April, 1938."⁹²

Denmark is, as a result of the new law, well ahead of the other two countries. In Norway a movement for birth control clinics effectively began in 1924, under the initiative of Madame Katti Anker Møller. There are now twelve clinics in Norway, privately and independently run, but all springing from the same initiative, and in recent years they have been officially recognised to the extent of receiving grants-in-aid from the National Health Insurance Fund and the local government authorities. But they still just touch the fringe of the population, and probably the

⁹⁰ If the figures for Oslo are correct, the estimate for the whole country may be too low. In the rural areas birth control is rather primitive and abortion widely practised.

⁹¹ See Dr. Leunbach, "La Réglementation des Naissances et de l'Avortement en Scandinavie" (*Le Problème Sexuel*, July, 1934). Leunbach, in his report on Denmark (in *International Medical Group for the Investigation of Contraception*, 5th issue, 1934) says that in 1932 a clinic for poor persons was set up by the *World League for Sexual Reform*.

^{91a} Or the offensive advertising of birth control appliances.

⁹² Now 1st October, 1939.

twelve clinics do not see more than 12,000 patients per year. *Coitus interruptus* is thus probably still the chief method of birth control, and this helps to throw some light on the relatively high frequency of abortion.⁹³

Sweden is much more backward than Norway. There it is not so much a question of legal bars as of the lack of co-operation from official and voluntary institutions. There is still a law which can be used against any birth control movement—passed as a result of a panic caused by a militant birth control movement which had begun to develop among working-class organisations—but it has rarely been enforced except against pedlars who sell contraceptives at public markets.^{93a} There is, in fact, a number of birth control clinics in the country—one private clinic, and four municipal clinics—but the table given below shows the extent to which these clinics are used.⁹⁴

	Number of patients seen by the various birth- control clinics			
	1933/4	1934/5	1935/6	1936/7
Stockholm				
(a) Sabbatsberg Hospital clinic . . .	102	244	116	?
(b) Riksförbundet clinic (private*) . . .	400	335	340	?
Göteborg municipal clinic	—	178	48	75
Malmö municipal clinic	—	88	48	?
Lund municipal clinic	—	—	37	35

* Excluding inquiries by letter, amounting to over 5,000 in the period.

This table slightly under-estimates the use of birth control clinics,

⁹³ Naturally birth-control clinics are not the only means whereby contraceptive information is spread. But the investigation in Sweden, referred to subsequently, shows that in Sweden, at least, the absence of any effective birth-control movement has seriously hampered the spread of modern contraceptive techniques. In the early days of the Norwegian birth-control movement, its development was hindered by paragraph 377 of the penal code, prohibiting the advertising or public exhibition of contraceptives, but since a test case in 1927, in which the Oslo clinic was involved, the law has fallen into abeyance. (Information from the annual reports of the Oslo clinic, and conversation in September, 1937, with Dr. Gerda Evang and the superintendent of the clinic.) As regards Denmark, the Population Commission believes that the knowledge of male methods of birth control is thoroughly widespread. The use of pessaries and other female methods is, of course, much less widespread.

^{93a} This law, passed in 1911, has been repealed by the last session of the *Riksdag*, and will not be in force after 1st January, 1939. According to information received from Mr. E. von Hofsten, the trade in contraceptives will shortly be licensed.

⁹⁴ Gårdlund, T., "Bättre polikliniker för födelsekontroll" (*Morgonbris*, April, 1937). But information recently received from Mr. Erland von Hofsten gives rather different figures for the *Riksförbundet*: 747 patients in 1933-4; 782 in 1934-5; 838 in 1935-6; and 1,884 in 1936-7. The partial figures for 1937-8 show a continuance of this progression. These figures were specially collected, and are almost certainly more correct than those given by Gårdlund. The figures for the *Sabbatsberg* clinic are, however, apparently correct. According to Mr. von Hofsten, The number of patients attending this clinic fell to 75 in 1936-7, but the partial data relating to the period October 1937 to August 1938 show a rise to 151. But the numbers for both clinics are in any case very small.

for the *Riksförbundet för Sexuell Upplysning* also has contracts with doctors in various parts of the country, on the basis of which contraceptive information is given to the local inhabitants. But even allowing for this undervaluation, it is still obvious that there is, apart from the *Riksförbundet*, no real birth control movement in Sweden. Even the existing clinics suffer from official indifference. In the Sabbatsberg hospital there are two clinics (abortion and psychiatric clinics) which receive each year about 1000 women who have attended as a result of undergoing criminal abortions. Each year about 100 of these women return having had another abortion less than a year after the previous one. Yet these women are not sent to the municipal birth control clinic in the same building. These facts help to explain why a recent investigation showed that of the patients attending the Stockholm clinics and the Sabbatsberg obstetrical clinic, well over 60 per cent. were, or had previously used *coitus interruptus* as their method of birth control.⁹⁵ As a corollary to this, according to Madame Ottesen Jensen, women in the outlying districts know nothing about modern birth control methods but all of them know how to procure abortions. Here, again, this fact is being recognised, and the establishment of birth control clinics is an essential part of the recommendations of the Swedish Royal Commission on population.⁹⁶

Correlating the information given in previous sections with the trend of fertility, it must be concluded that the desire to control reproduction is common to the women of all the countries to which reference has been made. Or, as Norman Himes puts it, "the desire to control conception is a wellnigh universal culture-trait, universal, that is, in time and space." Accepting this premise, it follows that, in cases of necessity, women will have recourse to any method, no matter how dangerous the consequences, to prevent the birth of children they do not want. In these circumstances there are very few methods by which the injurious consequences of abortion may be avoided. First, by providing women with effective means of preventing conception, so as to dispose as far as possible of the problem of interrupting pregnancies.⁹⁷ Secondly, by providing the kinds of material assistance which

⁹⁵ Gårdlund, T., "Vissa uppgifter om preventivteknikens utbredning." *Betänkande i Sexualfrågan* (1936), Appendix 11. See also same author, same report, Appendix 12, "Förefintliga Rådfrågningsbyråer för Sexualupplysning i Sverige."

⁹⁶ For a survey of the various proposals and measures for social reform in Scandinavia, see an article by the present writer, "Population Policies in Scandinavia," *Eugenics Review*, July, 1938.

⁹⁷ Some inquiries have shown an association between use of contraceptives and frequency of abortion. But it is only logical that if women are prepared to use means for preventing conception, they will also be prepared to have abortions if the contraceptives have failed.

will reduce the necessity, as it is seen through the eyes of the women concerned, to prevent pregnancies from going to term. Thirdly, in cases in which women have become pregnant but insist on preventing the birth of children, by providing facilities in which the injurious consequences of abortion may be reduced to a minimum—that is, by allowing the performance of abortions by skilled practitioners under conditions of asepsis.

These suggestions clearly need elaborating, particularly the suggestion referring to material encouragement to fertility.⁹⁸ Assistance might take many forms—family allowances, rebates in rent in relation to the size of the family, special provisions for ensuring that married women who continue in paid employment shall be able to have children without fear of losing their jobs, the establishment of crèches where women who wish to work, or maintain some form of social activity, may have their children looked after and fed at little cost,⁹⁹ and the replanning of housing, in order to provide accommodation in which children could be more easily brought up. It is true that material encouragement given in a number of foreign countries has not, with the possible exception of Germany, so far met with any conspicuous success. But this is probably less a matter of principle than of the relatively small amounts given. Assuming that the average wage is sufficient to support a man and his wife, about a hundred per cent increase would be necessary to support, at the minimum level, a family containing four children aged 4–5, 6–8, 10–12, and 12–14 years.¹⁰⁰ But in France, where family allowances are now legally compulsory in almost all strata of industry, commerce and agriculture, even the highest allowances do not appear to cover more than about thirty per cent of the cost of raising four children. Consequently, while the existing allowances may turn the balance in the case of those women who are wavering between having an abortion and allowing their pregnancy to go to term, they will not provide much incentive to the bulk of educated women who realise only too clearly the social and economic disadvantages of having more than one or two children.

But while the question of positive inducements is of the highest importance, the negative side of the question should not be forgotten. Clearly, even if women are encouraged to have more

⁹⁸ By the term "fertility," effective fertility is meant, and not physiological fecundability. To encourage fertility merely means to encourage women to have more children.

⁹⁹ For example, a collective crèche in Stockholm charges only about eightpence per day for looking after, and giving three meals to a child.

¹⁰⁰ The increase in cost has been estimated by averaging the calculations used in the New London Survey, the Merseyside Survey, the B.M.A. analysis, and the Week-end Review Survey.

children, there is a point at which they, and society, will wish to stop. Even in France, where the official attitude to birth-control and abortion is extremely antagonistic, few enthusiasts wish to encourage families of more than four or five children. When the optimum level has been reached (the term "optimum" being used here in a social and not an economic sense) there will still be a need to prevent further conceptions, and the maintenance of a low level of maternal morbidity and mortality will still depend upon providing women with adequate birth-control knowledge and appliances, and, in cases where birth-control has failed, allowing them to have abortions performed by qualified doctors under conditions of asepsis.

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Addition to n. 6, p. 98. If the acts of violence are committed with pre-meditation or with knowledge of the condition of the woman, the term of imprisonment shall be from six months to three years, and the fine from 50 to 500 francs.

Addition to n. 91a, p. 121. The law relating to birth control was paragraph 235 of the Danish penal code of 1913, under which it was possible to fine anyone communicating with the public, or with an unknown person or group of persons, offering to sell articles for preventing the consequences of sexual intercourse.

THE LAW OF ABORTION AND NECESSITY

THE recent trial at the Old Bailey on a charge of abortion of Mr. A. W. Bourne, one of the foremost obstetric surgeons and gynaecologists in London, aroused widespread public attention and raised legal points of considerable social importance.¹

The main facts of the case were as follows. A girl of fourteen had been the victim of an atrocious rape. The organiser of a Schools Care Committee took her to a Dr. Joan Malleson, who wrote to Mr. Bourne stating that she, as well as the police surgeon, the doctor at her work, and the school doctor, all considered that *curettage* should be allowed and suggesting that Mr. Bourne should perform this operation on the girl.² She reported that the parents³ "could not possibly let her go through" with the pregnancy and described the girl as normal and healthy "and in medical terms there is nothing to be said." In the light of the evidence at the trial, and, indeed, of the statement in Dr. Malleson's letter that "some psychiatrist might be prepared to sponsor this operation," it is clear that the reference to the healthy condition of the girl did not imply that the doctors had no fears as to the effects upon the general and, in particular, upon the mental health of the girl if the pregnancy were allowed to take its course. Mr. Bourne replied that he would 'be delighted' to admit the girl into St. Mary's Hospital and to *curette* her. He said, "I have done this before and have not the slightest hesitation in doing it again. . . . I have said that the next time I have such an opportunity I will write to the Attorney-General and invite him to take action." The parents consented to the operation on condition that the matter was kept secret, and the *curettage* was successfully done.⁴

At the trial, the chief medical witnesses were Dr. Malleson, Mr. Bourne himself, Mr. Gilliatt, surgeon at the Samaritan Free Hospital for Women, and Lord Horder, and they all stated practically the same point of view. Whilst admitting the existence of some variation of opinion within the medical profession itself, they

¹ The account of the trial is taken from *The Times* Newspaper, 19th and 20th July, 1938.

² The only dissident appears to have been a doctor who admitted the girl into St. Thomas's Hospital, whom Dr. Malleson thought "must be a Catholic." "He took the conventional standpoint that the child might be a future Prime Minister of England. He also said that sometimes girls lead men on."

³ She described them as "so respectable that they do not know the address of any abortionist."

⁴ The parents' wish for secrecy prevented Mr. Bourne from fulfilling his intention and it was stated that it was through no breach of faith on his part that the matter became public.

considered that the vast majority of medical men would consider the operation justifiable in the circumstances of the case. Dr. Malleeson, apparently, went a little further than her colleagues, for she thought that the operation would be justifiable in any case where a woman had been raped provided the offence had been proved in a court of justice. Mr. Bourne's attitude was, and Lord Horder agreed with him, that the operation is justifiable in any case where there is a substantial danger to health in allowing the pregnancy to proceed. The Attorney-General admitted that a fear of danger to life would be a good defence. The doctors argued that this was too narrow. "We cannot draw a line," they said "between danger to life and danger to health. If we waited for danger to life, the woman is past assistance." Counsel for Mr. Bourne insisted that his attitude was not that he wanted to force a change in the law or that he desired to be acquitted on sympathetic grounds; he considered that what he had done was lawful and desired to "get the law declared so that there should be no longer this controversy among the public and the medical profession as to what a doctor is allowed to do and what he is not allowed to do." He controverted the view of the Crown that before a doctor could operate he must be certain that the woman would otherwise die of her pregnancy, and he stigmatised as "a revolting proposition" the view that a doctor faced with the practical certainty of his patient's complete mental or physical breakdown must not procure her abortion. After the Attorney-General had reiterated his view that the jury should proceed on the basis that there was "a fundamental difference between saving life and preserving health," Macnaghten, J., summed up in a sense favourable to the view of the defence and the jury acquitted the defendant. The material points in the summing-up will appear in the course of the following discussion.

Mr. Bourne certainly succeeded in his object of getting the law declared, and declared in a new sense, but it would be idle to suggest that the decision does not leave a wide scope for the report of the Birkett Committee which is still considering the subject. Without anticipating in any way the contents of the report, or considering the sociological implications of this decision and of the law as it stands—a matter beyond the scope of this article—it might be useful to sum up briefly the main points established or stressed in this trial.

1. Macnaghten, J., indicated that the word "unlawfully" in s. 58 of the Offences against the Person Act, 1861, must be given some meaning although it was not defined in the Act. Consequently, there must be some procurements of abortion which

are lawful. At the start of the trial, Mr. Bourne's counsel strongly protested against the omission of the word "unlawfully" from the indictment, and it certainly was a curious omission not warranted by the precedents of indictments for this offence as generally set forth in the standard authorities. After remarking that he had "not had much time to make research into the authorities,"⁵ the Attorney-General agreed to the insertion of the word and his Lordship ordered the charge to be amended accordingly.

2. It was universally admitted that if the operation was done *bona fide* to save the life of the mother the defendant was entitled to an acquittal. As will be shown later in this article, this has not been such a well-established proposition of law as the Judge and counsel appeared to treat it.

3. The preservation of life from a practically certain death is not the only ground of justification to a charge under s. 58. This case constitutes a precedent for stating that the *bona fide* object of avoiding the practically certain physical or mental breakdown of the mother will afford an excuse. His Lordship said to the jury, "You have heard a great deal of discussion of the difference between danger to life and danger to health. I confess I have had great difficulty in understanding what the discussion really meant. Life depends on health, and it may be that if health is gravely impaired death results. . . . There may be some women who desire the operation to be performed, but the desire of a woman to be relieved of her pregnancy is no justification for performing the operation. There are also religious convictions that the operation should not be performed in any circumstances; but that is not the law either. If pregnancy is likely to make the woman a physical or mental wreck you are quite entitled to take the view that a doctor who, in these circumstances and led by his belief, operates, is operating for the purpose of preserving the life of the woman. . . . If a doctor in good faith thinks it necessary for the purpose of preserving the life of the mother, in the sense that I have explained, not only is he entitled to perform the operation, but it is his duty to do so."

4. The burden of proving that the procurement of abortion is not lawful is upon the Crown. "The question the jury have to consider," remarked his Lordship, "is not whether they are satisfied that Mr. Bourne did the operation in good faith for the purpose of preserving the life of the girl, but whether the Crown has proved the negative of that."

5. This case does not go beyond establishing these propositions

⁵ Had he done so, he would have found that the word "unlawfully" generally appeared in precedents for this offence even before the 1861 Act.

and, even within the limits of the matters of defence specified above, "each case depends upon its own particular facts, and the circumstances of each case must vary infinitely." It may be that in the future some grounds of justification other than those mentioned in this case may be admitted, such as the one suggested by Dr. Malleson in her evidence, but the summing-up in this trial contains no suggestion whatsoever that that may be so. His Lordship remarked, "The law of the land has always held human life to be sacred, and the protection the law gives to human life extends to the unborn child. ⁶ The unborn child must not be destroyed except for the purpose of preserving the yet more precious life of the mother." Lord Horder wrote after the trial, "Without subscribing to the view expressed by counsel during the course of the case, that there is a strict analogy between the operation for abortion and the operation for amputation of a limb, it remains extremely probable that what the law demands of doctors is the same in both cases—the exercise of 'reasonable care and skill.' And 'care' is clearly intended to include full consideration and competent judgment in every individual case."⁷ This statement may prove to be a correct prophecy, but, as the law now stands, it needs the qualification that "the competent judgment" of medical men must rest not only on *bona fide* medical considerations but also on a correct appreciation of the considerations of which the law approves or disapproves. Those on which it has set the seal of its approval have been specified and nowhere is there any suggestion in legal authorities that there is any general principle of defence extending beyond the limits established by this case.

The safeguards suggested in this summing-up against an abuse of the law can be summarised under three heads: (i) the limitation of the defences to those specified, (ii) the statement that members of the medical profession alone are the persons who can properly perform such an operation,⁸ and (iii) the insistence on the requirement of good faith even on the part of medical men. Despite the fact that the burden of proof is on the Crown, it is obvious that in practice the defence will have its share in the burden of proof. One of the *indicia* of good faith suggested in the summing-up was that the defendant acted "only in consultation with some other member of the profession of high standing

⁶ How far this is true may be judged from remarks on the subject in the article on "Child-killing in English Law" in this journal, Vol. I, pp. 209-10, 273, etc.

⁷ *The Spectator*, 22nd July, 1938.

⁸ In France, the professional status of the delinquent abortionist is specifically made a matter of aggravation, Garraud, *Droit Pénal Français*, 1924, Vol. v., p. 382.

so as to form the view that the circumstances were such that an operation has to be performed and is legal." This may not be a complete safeguard against the abuse of the law by all members of the medical profession, but it is *some* safeguard. It is a requirement which has been so underlined in text-books on medical jurisprudence for such a long time that to disregard it would be prejudicial to the case of any medical defendant. The admirable, if eminently Victorian, Dr. Taylor, certainly as far back as 1858, whilst insisting that the law should not condemn "that which is performed without evil intention," counselled consultation with another practitioner as well as "a cautious selection" of cases for the operation. In the modern editions of his work the procurement of a second professional opinion is described as "a golden rule."⁹ If idle gossip be true, "golden" may bear two meanings in this context!

There are two further matters of general interest from the strictly legal point of view which emerge very clearly from the report of the trial. The first is the paucity of references throughout the trial to legal authorities of any kind. Counsel for the defence could only refer by way of analogy to the proviso in the Infant Life Preservation Act, 1929, which makes the *bona fide* intent to save the life of the mother a good defence to a charge of child destruction. Macnaghten, J., stated that the words of this proviso expressed what, in his view, had "always been the law in regard to the procurement of abortion," but he made no reference to any legal authority supporting this proposition. The only other historical reference he permitted himself to make was the general and doubtful one that abortion had been an offence "long before 1861" and that it was an offence "under the Common Law of England before Parliament ever existed." He admitted that he knew of no authority covering the facts of the instant case. The second matter of interest is that this trial once more attracts attention to the extreme vagueness of Necessity as a general defence in the English criminal law.

The paucity of references to authorities is understandable if one consults the current standard text-books on the subject, the law reports, and the historical sources such as Lambarde, Coke, Hale, Hawkins, Blackstone, Chitty and others, not to mention the works of modern historians. Abortion is evidently a crime without much recorded or reported history. Some of the French text-books dilate a little on its history,¹⁰ but in English the only general

⁹ See, e.g., Taylor, *Medical Jurisprudence*, 6th ed., pp. 582-3.

¹⁰ See, e.g., Garraud, *op. cit.*, p. 368 *et seq.*, Le Foyer, *Exposé du Droit Pénal Normand au XIII Siècle* (1931), p. 71 *et seq.*, C. L. Von Bar, *History of Continental Criminal Law* (1916), p. 165 *et seq.*

history discovered in the course of a necessarily brief period of investigation was in Westermarck's treatise on "The Origin and Development of the Moral Ideas."¹¹ where a rather fuller account may also be found of the allied topic of infanticide. In the nature of things, the practice of abortion, necessitating, as it does, some knowledge of anatomy, appeared later than that of infanticide. Without summarising Westermarck's account of the practice amongst savage communities, a reference may be made to his note of the approval given to the practice, as a preferable alternative to that of infanticide, by Plato and Aristotle. Roman Law drew a distinction between feticide and infanticide; the unborn child was accounted merely as a *spes animantis* and not as an *infans*, a part of the mother "as the fruit is a part of the tree till it becomes ripe and falls down."¹² Garraud points out that in Roman law abortion was regarded rather as an offence against the parents than against the unborn life and that it was no offence if done with their consent.¹³ From the works of Le Foyer, Westermarck, and others, it is possible to draw a fairly clear picture of the views entertained on the subject by the early and medieval Christian Church which dissented strongly from those of the Roman Law and strongly influenced the Continental and English criminal law right down to the nineteenth century. Christians strongly stressed the sanctity of human life from its very beginning. Westermarck quotes Tertullian's saying, "Prevention of birth is a precipitation of murder; nor does it matter whether one take away a life when formed, or drive it away when forming. He is also a man who is about to be one. Even every fruit exists in its seed."¹⁴ This strict view was modified by a distinction which was destined to have a profound effect on the law down to modern times. "St. Augustine makes a distinction between an embryo which has already been formed, and an embryo as yet unformed. From the creation of Adam, he says, it appears that the body is made before the soul. Before the embryo has been endowed with a soul it is an *embryo informatus*, and its artificial abortion is to be punished with a fine only; but the *embryo formatus* is an animate being, and to destroy it is nothing less than murder, a crime punishable with death."¹⁵ This distinction between an

¹¹ Vol. I, p. 413 *et seq.*

¹² Quoting Spangenberg, "*Verbrechen der Abtreibung der Leibesfrucht*" in *Neues Archiv des Criminalrechts*, ii, 23.

¹³ *Op. cit.*, p. 370. For references to Roman Law, see *ibid.* and Le Foyer, *op. cit.*, p. 74, n. 2.

¹⁴ Quoting *Apologeticus*, 9.

¹⁵ Quoting *Questiones in Exodum*, 80; *Questiones Veteris et Novi Testamenti*, 23. We may smile at these ideas on the emergence of the soul, but they affected the views of an English Secretary of State as late as 1866, see this journal, Vol. I, p. 207.

animate and an inanimate foetus was embodied both in Canon¹⁶ and Justinian Law¹⁷ and passed subsequently into various law-books."¹⁸ "The criminality of artificial abortion was increased by the belief that an *embryo formatus*, being a person endowed with an immortal soul, was in need of baptism for its salvation." Otherwise, it would be punished everlastingly in eternal fire, not for its own sin but because it carried with it the condemnation of original sin from its first conception.¹⁹ Westermarck ends his account with a brief note on how popular feeling became opposed to the doctrine that the life of an embryo was equally sacred with the life of an infant and how this led to a modification of the punishment for abortion, a matter to which reference will be made later in the description of the development of English law.²⁰

In the brief period at our disposal before this journal went to the printers, it was impossible to undertake an investigation of the provisions, if any, of the Anglo-Saxons laws on the subject of abortion or to check the statement in the *Encyclopaedia of Social Sciences*²¹ that it was regarded in them as an ecclesiastical offence only. But it is clear that from fairly early times it was regarded as an offence of ecclesiastical cognisance, possibly because of its supposed connection with magic and sorcery.²² How completely it fell within the ecclesiastical jurisdiction in France may be judged from Le Foyer's treatise on the Norman penal law of the 13th century.²³ The authorities on the ecclesiastical jurisdiction in England are sparse, but in Archdeacon Hale's "Precedents"²⁴ the following note is found under the date 1527: "Margareta Saunders notatur quod potionibus infantulum in utero Johanne

¹⁶ The reference is to Gratian, *Decretum*, ii, 32; see also, Le Foyer, *op. cit.*, p. 74, n. 3.

¹⁷ Westermarck explains the origins of the early rule, not accepted by the glossators, that a male was *animatus* 40 days after conception, a female 80 days. The glossators fixed it for both at 40 days. Cf. the English difficulties about when a woman was "quick with child," *infra* n. 34.

¹⁸ Westermarck gives a list of them, *op. cit.*, p. 416, n. 5.

¹⁹ Westermarck, *op. cit.*, p. 417, quoting St. Fulgentius, *De Fide*, 27. He shows how the doctrine was later called in question by Thomas Aquinas, basing his note on Lecky, *History of the Rise and Influence of the Spirit of Rationalism in Europe*, i, 360, n. 2. See also, Le Foyer, *op. cit.*, p. 74.

²⁰ His authority is Von Fabrice, *Die Lehre von der Kindsabtreibung und vom Kindsmord*, p. 199.

²¹ Vol. i, *sub. tit.* "Abortion."

²² Le Foyer, *op. cit.*, p. 72.

²³ *Ibid.* He remarks how the lay texts ignored the matter; but note the distinction between abortion and the crime of *encis* where a third party killed the child or the mother, which the regional customals treated severely, see Von Bar, *op. cit.*, p. 166.

²⁴ "Precedents and Proceedings in Criminal Causes, 1475-1640, extracted from Act-Books of Ecclesiastical Courts in the Diocese of London," 1847, a work which Miss Sitwell should have consulted before writing on the "English Eccentrics," and one which throws a vivid light on the variety of matters dealt with by the ecclesiastical courts.

Byrde interemit: comparuit et dominus oneravit juramento eandem et Johannam Byrde, de fideliter respondendo articulis per eum objiciendis, et objecto articulo Johanne Byrde negavit eundem."²⁵

It is probably due to the fact that the offence was one of ecclesiastical cognisance which accounts for the extreme paucity of references to abortion in the authorities on English criminal law. Bracton, who, as Stephen points out, carried the law of homicide to a length not adopted in later times, stated, "Si sit aliquis qui mulierem praegnantem percusserit vel ei venenum dederit per quod fecerit abortionem, si puerperium jam formatum vel animatum fuerit, et maxime si animatum, facit homicidium."²⁶ Fleta "copies and somewhat abridges Bracton" and Le Foyer quotes his proposition, "Item facit homicidium mulier quae puerum animatum per potationem et hujusmodi in ventre devastaverit."²⁷ Later authorities did not follow this view; to constitute homicide the victim must be completely born alive.²⁸ Coke quotes Bracton and mentions Fleta, but remarks, "If a woman be quick with child, and by a Potion or otherwise killeth it in her womb; or if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder."²⁹ Not only is this Coke's sole contribution to the subject of abortion but it is also a precedent for later writers on the criminal law for generations, such as Hale, Hawkins, and those who wrote for the justices of the peace, Jacob, Shaw, Dalton and others, who have nothing to add of substance to Coke's dictum. They give no aid to the discovery of how, if at all, the lay courts took cognisance of the "great misprision" which was not murder. The only references to it as a possible offence at common law come from the nineteenth century when the law of misprision was regarded as obsolete.³⁰ Dr. Holdsworth, after describing how the criminal jurisdiction of the ecclesiastical courts was abolished in 1641 and restored in 1661, explains how the jurisdiction was gradually diminished thereafter by the practice of making

²⁵ *Ibid.*, No. 331; see also precedent no. 128 (1489): "J.R. percussit A.W. et ex percussione predicti J.R. ipsa A.W. erat deliberata puero existente mortuo. XV die Feb. comparuit et negavit articulum et ad purgandum se vi manu."

²⁶ Stephen, *Hist. Cr. L.*, iii, 32. It is of interest to note in this connection the previous remark of Stephen, quoting Twiss, that Bracton took his divisions of homicide from the *Breviarium Extravagantium* collected by Bernhard of Pavia from Decretals not collected by Gratian.

²⁷ *Op. cit.*, p. 74, quoting Fleta, i, 23.

²⁸ This subject was discussed at length in this journal, Vol. i, p. 203 *et seq.*

²⁹ *Inst.*, 3, c. 7.

³⁰ In the evidence of Willes and Bramwell before the Capital Punishment Commission, 1866, B.P.P., 1866, 21, pp. 23, 274; see this journal, Vol. i, pp. 211-12. These judges would have been much surprised to hear of the law of misprision being revived in the Wimbledon murder case in 1938!

ecclesiastical offences felonies and so removing them from the competence of the ecclesiastical courts.³¹ We have no evidence that this happened in the case of abortion until 1803. A suggestion that abortion was a common law offence and tried as such comes from Chitty's *Criminal Law* (1816) where precedents of an indictment for this offence are set forth both under the Act of 1803 and under the common law.³²

In the article on Child-killing in the preceding volume of this journal, the terms of the statute 21 Jac. I, c. 27, relating to the murder of bastard children by their mothers, were set out at length. Lord Ellenborough's Act, 1803 (43 Geo. 3, c. 48) repealed this Act and stated in its preamble that "certain . . . heinous offences, committed with Intent to destroy the lives of His Majesty's Subjects by Poison, or with Intent to procure the miscarriage of Women . . . have been of late also frequently committed; but no adequate Means have been hitherto provided for the Prevention and Punishment of such offences." It proceeded to enact that the administration of poison, or other noxious and destructive thing, with intent to murder, or thereby to cause the miscarriage of a woman "then being quick with child," should amount to a capital offence. It further provided that the administration of poison, *etc.*, or the use of instruments, with intent to procure miscarriage "where the woman may not be quick with child, or it may not be proved that she was quick with child," should constitute a felony punishable with transportation for fourteen years, as an alternative to imprisonment, the pillory and/or a whipping. This enactment, the first statutory one relating to abortion, is of interest because of its recognition of the ecclesiastical distinction between the *embryo formatus* and the *embryo informatus* and its retention of capital punishment for the abortion of the former.³³ The Offences against the Person Act, 1828, retained this distinction and mitigated but very slightly the punishments provided by the earlier law.³⁴ Reform came with

³¹ *Hist. Eng. L.*, Vol. I, pp. 620-21.

³² Vol. 3, pp. 797-8; the common law precedent is said to be taken from the Crown Office, Mich. Term, 42 Geo. III.

³³ In France the matter had been dealt with much earlier, see Garraud, *op. cit.*, p. 371, referring to the edict of Henry III, in 1556, "contre les mères qui avaient occulté leur grossesse," and subsequent ordinances.

³⁴ These Acts did not attempt to define when a woman could be said to be "quick" with child; for a remarkable interpretation of the law on this point, see *R. v. Philips*, 3 Camp. 77. For the complicated technicalities occasioned by the distinction, see *R. v. Scudder*, 3 C. & P. 605, and Archbold, 4th ed., p. 357. It seems that the original intention of the promoters of the Bill was to equate the punishments in both cases, but this was not done, Par. Debs. (N.S.) Vol. 18, 1173. Apart from Peel's speeches the debates are not well reported; the reports end cryptically with the remark, "A long and desultory conversation took place on the respective clauses"—*ibid.*, Vol. 19, 359.

one of Lord John Russell's nine reform measures of 1837, abolishing the death sentence in a great variety of offences and implementing the recommendations of the First Criminal Law Commissioners—the first-fruits of their great labours.³⁵ The Offences against the Person Act, 1837, s. 6, gave to the offence of abortion its modern form; it abolished capital punishment for the offence and removed the distinction between the *embryo formatus* and the *embryo informatus*. As a result of the criticisms of Lord Lyndhurst, the requirement of proof of the pregnancy of the woman on a charge of procurement of abortion by a third party, which had originally been included in the clause, was omitted from the final draft.³⁶ The 1839 and 1846 Reports of the Criminal Law Commissioners contained little of note with reference to abortion, save on the defence of Necessity, to which we shall refer later. The terms of s. 58 of the Offences against the Person Act, 1861, the latest enactment on the subject (apart from modifications of the punishments provided for the offence), removed any doubts as to whether the mother herself could be guilty of the offence by enacting a specific provision relating to her.³⁷ The Act contained a novel provision in s. 59, designed to check the supplying of or obtaining of poisons, *etc.*, or instruments with knowledge of the unlawful intent to procure miscarriage.³⁸ Except on the matter of Necessity, the provisions of the Draft Criminal Code contained nothing of note on the subject save a suggestion as to the modification of the punishment of the woman herself and an express provision relating to her as an aider and abettor.³⁹

To turn briefly to the other matter raised by the trial of Mr. Bourne, the extreme vagueness of Necessity as a general defence in English criminal law is too well-known to need exposition. Every student of the elements of the subject knows how unsatisfactory was the discussion of the matter in the leading case of *R. v. Dudley and Stephens*.⁴⁰ Apart from the notable efforts of

³⁵ Critics of the indecent haste with which modern legislation is passed should read the accounts of the passage of these measures! See *Parl. Debs.*, Vols. 36–38.

³⁶ Capital punishment for this offence had been abolished in France in 1791; Garraud, *op. cit.*, p. 370. Bavaria seems to have been the last to abolish it, see the Appendix on "Capital Crimes in Foreign Countries" in the Report of the Capital Punishment Commission, B.P.P., Vol. 21.

³⁷ Doubts had been raised whether she came within the terms of the 1837 Act, save possibly as an aider and abettor. In France between 1791 and 1810 the woman who consented was exempt, a provision designed to facilitate disclosure by her of the identity of the abortionist, Garraud, *op. cit.*, p. 370.

³⁸ The Church in France had dealt with this matter as early as 1600, *Le Foyer*, *op. cit.*, p. 74, n. 5.

³⁹ For the present law on this subject, see *R. v. Sockett*, 24 T.L.R. 893.

⁴⁰ 14 Q.B.D., 273. A few years before the case, in the discussions of Stephen's reform proposals, some of the judicial witnesses thought that the possibility of the occurrence of such facts was so remote that the law should not provide for them!

Fitzjames Stephen, who in his draft bills between 1874 and 1880 did attempt to formulate the general principles on which the defence should be based,⁴¹ English lawyers have fought shy of defining the defence and, indeed, have generally considered that it is better left undefined. It is not surprising, therefore, that the Court in *R. v. Bourne* should complain that it was not aided by authorities. Some of the medical text-books (and *Russell* has followed them) have long insisted that the word "unlawfully" in s. 58 of the Act of 1861 "excludes from the section acts done in the course of proper treatment in the interest of *the life or health* of the mother,"⁴² but they have not had much legal authority to support them. As far as saving the *life* of the mother goes, it does seem to have been accepted as a defence as a matter of professional understanding for some considerable time, but that it was considered doubtful even as late as 1896 is shown by the fact that the Royal College of Physicians sought counsel's opinion on the matter in that year. The opinion then given was that *bona fide* efforts to save the life of the mother or the child constituted a good defence to artificial abortion.⁴³ Stephen's view in 1878, to which we shall refer shortly, suggests the qualification that it would be no defence to save the life of the child by acts likely to kill the mother.

The subject illustrates once more the haphazard nature of criminal law reform in England and how the efforts of reformers have been neglected. As far back as 1846, the Criminal Law Commissioners, after setting out the law relating to abortion, suggested the addition of this proviso: "Provided that no act specified in the last preceding Article shall be punishable when such act is done in good faith with the intention of saving the life of the mother whose miscarriage is intended to be procured." They appended a note to this: "This proviso seems expedient: it is contained in other codes, but does not appear to have been adverted to in our treatises."⁴⁴ To this day, the proviso has not been specifically attached to the crime of abortion; *R. v. Bourne* is therefore notable if only for its clear recognition of the defence suggested in 1846. The defence was not stated in the Act of 1861. Subsequently, it is clear that Stephen encountered great difficulties whenever he raised the question. His original Draft Code contained a general clause relating to Necessity (No. 23), and it is noteworthy that to this clause he appended the proviso: "Nothing here contained shall justify any person in any act or omission by

⁴¹ They can be found stated in his *Digest of the Criminal Law*.

⁴² *Russell*, 9th ed., I, 517, quoting Taylor, *Medical Jurisprudence*.

⁴³ Taylor, *op. cit.*, 8th ed., p. 144.

⁴⁴ B.P.P., 1846, 24, 42 (art. 16).

which the death of any woman is likely to be caused in order that any child of which she is pregnant shall be born alive." His provisions relating to abortion were contained in the same clause as that which included his novel provision relating to child destruction, to which he had appended a proviso designed to protect *bona fide* acts done to save the life of the mother.⁴⁵ By the next stage in the history of the Draft Code the general Necessity clause (No. 23) had disappeared altogether and the abortion and the child destruction provisions had been separated, the latter carrying with them the proviso protecting *bona fide* attempts to save the mother.⁴⁶ The next we hear of any such proviso is in Lord Robert Cecil's abortive Infant Life Protection Bill, 1909. Lord Hailsham secured the insertion of a similar clause in the Bill which became the Infant Life Preservation Act, 1929, and it was this which supplied counsel for Mr. Bourne with his strongest legal argument for the recognition of a similar defence in relation to the crime of abortion.⁴⁷

Finally, it is instructive to observe that the words "abortion" and "miscarriage" have never been specifically defined. The "miscarriage" mentioned in s. 58 of the 1861 Act may be procured, apparently, at any time before the birth of the child.⁴⁸ The definition is not without importance because on it depends the distinction between abortion and other offences, particularly that of child destruction. We have already drawn attention to Stephen's views of the line of demarcation between homicide and other offences and to the extra-judicial views of Willes, J., on the subject.⁴⁹ Macnaghten, J., lent his support in *R. v. Bourne* to the view of counsel for the defence that the Infant Life Preservation Act, 1929, deals "with the case where the child is killed while it is being delivered." The question arises whether this is a correct limitation to apply to the offence of child destruction. The Act of 1929 in no way refers to delivery but speaks of "causing a child

⁴⁵ B.P.P., 1878, 2, clauses 23, 168.

⁴⁶ B.P.P., 1878-9, 2, clauses 212-215.

⁴⁷ See this journal, Vol. 1, pp. 276, 279, 280.

Le Foyer remarks, "Les Canonistes ont aussi envisagé une autre hypothèse : celle de l'avortement volontairement pratiqué pour sauver la santé de la mère"—St. Annon., Sum. Theol., 111, tit. 2, c. 75—*op. cit.*, p. 74, n. 3.

⁴⁸ Sir Alex. Simpson in the *Encyclopædia Medica* (2nd ed.) defined abortion as an interruption before the foetus is viable, as distinguished from interruptions that occur during the last trimester of pregnancy when the infant expelled is viable. He remarked that "abortion" was a term sometimes limited to interruptions that occur before the date of quickening, the term "miscarriage" being applied to those that occur between the fourth and seventh months of gestation. Garraud draws attention to the discrepancy between medical and legal phraseology in France, *op. cit.*, p. 368. The *Encyclopædia of Social Sciences* refers to abortion as the practice of "giving birth to the foetus before it becomes a viable human being, which is twenty-six weeks after conception."

⁴⁹ See this journal, Vol. 1, pp. 205, 212.

to die before it has an existence independent of the mother." The child must be "capable of being born alive" and "for the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be *prima facie* proof that she was pregnant at that time of a child capable of being born alive." A verdict of guilty of the one offence is possible on an indictment for the other, but nowhere is there any clearly indicated line of demarcation between the two offences of procuring abortion and child destruction.

The question of the liability of the person who kills a mother through acts done with intent to procure her miscarriage is outside the scope of this article, but it is well to note that it is a subject which has caused difficulties. The modern conclusion on the subject is a logical one and the one curious feature of the law seems to be that the same logic has not yet been fully applied to other cases now dealt with as cases of murder. But that is a matter on which Mr. J. W. C. Turner and others have spoken with authority in the *Cambridge Law Journal* and elsewhere.

D. SEABORNE DAVIES

[We shall publish a note on the medical aspects of *R. v. Bourne* in the next number of the MODERN LAW REVIEW.—Editor.]

LEGISLATION AND ROAD ACCIDENTS

THE problem of road accidents has occupied the public mind to such an extent during the last few years that its importance needs scarcely any further emphasis. In the initial period of development the motor car was regarded more as a nuisance than a real danger, but already shortly before the outbreak of the war the authorities became very much perturbed by the steadily mounting figures of killed and injured persons. In 1912 a Select Committee on Motor Traffic made an extensive survey of the situation in London and the indeed amazing amount of information gathered by that body not only at home but also abroad showed quite clearly to what extent the government had become alive to the seriousness of the problem. Comparisons with other great cities of the world showed quite clearly that the position in London had already become very dangerous indeed. In fact, London had in 1912 9.33 fatalities per 100,000 population, while New York had only 4.71, Vienna 2.88, Berlin 4.34. Only Paris with 8.25 and Chicago with 7.8 came near the London figures. (As a matter of immediate interest it may be mentioned in passing that the figure in 1935 for Greater London was 13.1.)

The war prevented any serious attempt at tackling this problem in a way which might have forestalled a development that took place later on. Lives were not only cheap, but during that period the nation was preoccupied with a much sterner task. Thus the question of road accidents was shelved for a time.

During the post-war period, again, very little thought was given to any methods which then might have contributed successfully to a substantial reduction of road accidents. Meanwhile motor traffic grew at an alarming rate and it is still almost incomprehensible that the accompanying rise in deaths and injuries passed almost unnoticed until approximately 1930. By that time the number of fatal and non-fatal injuries had already reached the colossal figure of 185,000. It is significant for the rapid increase that between 1926 and 1930 the number of deaths had risen by almost 50 per cent. The fact that up to that date no compulsory insurance system was in force, perhaps more than anything else, brought home to the population, as well as to the authorities, the urgent necessity for swift action. The Road Traffic Act of 1930 initiated a period in which a great many legislative measures were taken to combat this new danger. Hand in hand with this development came a vast improvement in the methods of collecting information as to the causes of accidents. The immediate consequence of such better knowledge of details

and its reaction upon legislative measures can easily be traced. The availability of new data led in subsequent legislation to a quick incorporation of what were deemed to be the right counter measures.

Before going into the problem as to whether and how legislation has or has not been instrumental in influencing the trend of road accidents it will be necessary to make a few very important points clear. This need for clarity is dictated not only by the very complex nature of the problem but even more by the aptness of the observer to lose himself in details.

The latest analysis of road accidents (1936-7) ascribes these various mishaps to well over 100 different and individual causes. As this subdivision refers only to main causes assigned in each case which comes before the courts it must be realised that actually many more causes could be found if we were to look for more details. There is very often a great difficulty in attributing the blame for an accident to an individual factor, and the investigator frequently is bound to be at a loss to place a particular incident in one or the other category without making a number of assumptions that may or may not be true. The mere fact that appeals against fines and convictions are sometimes successful bears out this statement.

The veritable flood of letters to the Press which accompanied the renewed publicity given to this problem shows clearly the abyss of details in which any effective measure of prevention may get lost. We have said already that in 1930, 185,000 people had been killed and injured on the roads. Counting relatives, friends and acquaintances it must be obvious that perhaps a million or more people had reasons to give vent to their own ideas as to the prevention of such occurrences. Even when we realise that many of the cases were very much alike there are enough left to provide the material for thousands of details to be made responsible. If we take the human element alone the causes could be split up into a great many more than the above mentioned 100 categories.

The greatest danger of losing sight of essentials is, of course, that we may go on fighting the danger with palliatives where only a major operation could be successful.

The causes of accidents can be divided broadly into three main groups, namely: (1) Man, (2) Machine, and (3) Conditions. If we regard these three factors merely from the numerical point of view we will realise that an increase or decrease of any of them will have some decided influence upon the development of road accidents. If one of the factors should increase or decrease in size faster than the others then we might be able to see whether

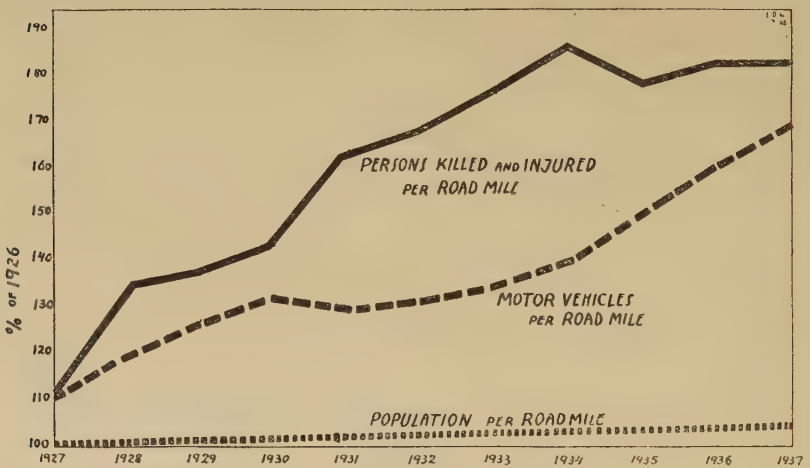
it has been responsible to a greater or lesser degree than the others. If we substitute the terms "population, vehicles and roads" for the three items named above then one thing will become obvious, namely, that an increase of the first two in relation to each other as well as numerical changes of both in relation to the third will alter the conditions which are favourable or unfavourable to a progressive development of road safety. Thus the mere fact that there are more people and more motor cars about will, in itself, increase the chances of an impact between those two factors. If the space within which man and machine have to move remains the same (that is, if the length and the width of roads is not altered), then the merely numerical opportunities of violent contact are increased. Thus we see that the statistical law of great numbers applies also in this sphere, and this fact is one of the first things we have to realise when approaching the subject.

Beneath such changes in size as have been touched upon just now other developments may take place which are not easily traced. If the population of Great Britain has increased by, say, 10% during a given period that does not mean that there are only 10% more people using the streets. Changes in habits during that period may have caused a much greater proportion of the population to move in the streets and roads; in fact, it may be 30% or 40% more. If we compare present-day habits with those of the Victorian Age, then we will be struck immediately by the changes that have come about in this respect. People used to stay at home much more and the spreading of the open-air habit, to use a general expression, most certainly has contributed to a more than proportionate increase in the numbers of road-using pedestrians. The development of entertainments such as the cinema or theatre also makes a greater number of people use the streets of a town than was the custom thirty or forty years ago.

A development on similar lines has taken place where the motorist is concerned. There are not only more motor cars in existence but they are used much more intensively than before. Originally an item of luxury, used for occasional outings, this vehicle has indeed become an essential part of our daily lives. While in other forms of transport, such as the railways, variations in the intensity of use can be measured by figures like vehicle- or passenger-miles such a possibility does not exist where the private motor car or cycle is concerned. There are some ways in which we can gauge a development of this sort. If, for instance, we follow up the biannual traffic census taken at a number of points in London then some idea as to the increase in traffic can be reached. Between 1912 and 1935 the total number of vehicles counted at all

the census points increased from 806,131 to 1,353,194 or approximately by 68%. But even this figure cannot convey to us the actual changes that may have taken place during the period mentioned. In fact, motorists, nowadays, try more and more to avoid those main traffic points by using less frequented roads and streets and thus the real increase in intensity of use can only be imagined after taking such factors into account.

Thus, figures which could show us with some degree of accuracy the development "inside" a merely numerical increase of population and vehicles are not available. We have therefore at our disposal only certain basic data from which we can arrive at some general conclusions. It will be clear from the points just



mentioned that a statistical analysis even of such data cannot "tell the whole story." It must always be kept in mind that a considerable amount of information is hidden underneath this traceable development.

When we look at the figures which show us the growth of any of the three main factors mentioned, it will be quite obvious that the number of motor vehicles has risen at a much quicker rate than the size of the population or the space available on the roads for the movement of traffic. The above diagram makes this point quite clear. In the picture the three items, population, vehicles and roads have been brought into relation to each other in such a way that the first two factors are shown as functions of the third. The figures are given in percentages of the 1926 data.

As far as the growth in the number of vehicles is concerned one point must be mentioned which has been the subject of a long

controversy. It is maintained that it would be more accurate to relate this figure to the growth of the I and II Class road mileage only. The reasons advanced for this demand are as follows: The classification of roads in Great Britain is undertaken not in accordance with the type of construction of a particular road but according to the amount of traffic which is estimated to use it. As the bulk of the traffic passes over the "classified" roads we can see that the limitations of "conditions" as regards the flow of traffic are really much greater than is shown by using the "total" road mileage as a criterion. On the other side such a method would be less correct where the population factor is concerned. But even if we make allowances for this fact an experimental test of graphs showed that the difference in the shape of the curve is fundamentally not great. Thus for our purpose the "per total road mile" figure is quite adequate to make our argument clear.

As a third item the number of persons killed and injured has been included in this picture, and the curious shape of the line will at once attract the attention of the reader. The first "break" in 1930 is due largely to an increase of non-fatal injuries (deaths, in fact, declined sharply during 1931 and 1932). This rise can be ascribed to the increase of "listed" injuries, a consequence of the introduction of compulsory insurance in 1930. The decline shown after 1934 may be attributed to the effects of legislation which in that year made a special effort to combat the increasing danger of the roads.

To return to our original problem. The diagram will make it obvious that the increase in motor vehicles has in fact outrun any numerical changes in the size of population or space of roads. The accompanying rise in the number of accidents points quite clearly to the motor vehicle as the culprit.

Although extensions and widening of roads have taken place no adjustment of the space which is used by pedestrians, cyclists and motorists alike—not only in greater numbers but also more intensively—has been undertaken in any proportion with the growth of the latter.

Thus, to borrow a phrase from the engineer—an ever-increasing stream of traffic units has been pumped under increasing pressure into the main arteries of the country's highway system, while only minor measures have been taken to make the space fit the traffic. Besides such minor constructional changes as have been mentioned above the only noticeable measures have been in the sphere of control. It was obvious that the *laissez-faire* policy of highway usage had to give way to a policy of more or less strict

control of the traffic stream if a complete muddle was to be avoided.

Our first conclusion, then, must be, that merely numerical changes in the number of traffic units—particularly motor vehicles—in relation to the space available for movement have to be considered as one of the primary causes of an increase of accidents.

In addition to the increase in traffic, however, another factor soon became obvious when the motor car appeared on the roads. Until the advent of the mechanically driven vehicle the difference in speed at which the various users of the road travelled (horse-drawn vehicles, cyclists and pedestrians) was not considerable. This point is particularly important for the following reasons: One of the major principles of safe road usage is the necessity of each traffic unit making it absolutely clear as to what it is going to do next. The correction of any mistakes made in that respect or any change in the road-user's intention is, of course, the easier the more time there is to announce or to realise such a change. The faster the traffic moves the less time is available for such action to take place. Thus the transition from a more or less leisurely to a very much accelerated pace of movement can take less account of the human factor involved in the problem.

The charges, then, which can be made against the existing highway system are twofold. First, it fails to accommodate a stream of traffic which has increased beyond any conceptions of the past. Secondly, it makes no provisions for the changes that have come about as regards the rate of speed at which a new form of transport moves. The combination of these two deficiencies, in fact, must be regarded as the primary cause of road accidents and such a major cause cannot be cured by palliatives; only a major operation can help. The remedy is obviously the adjustment of the space to the numerical increase of traffic units, and, further, the different users of the highway must be segregated as the differences in their relative speed of movement are incompatible with the demands of safety.

The need for such a major operation has, in fact, slowly gained recognition and action has followed in various ways. Thus the taking over of a considerable mileage of arterial roads by the Ministry of Transport has opened up the possibility of a uniform constructional policy. The main lines of such a policy are bound to be influenced very strongly by the two conclusions which have been presented above: widening of the roads and separation of road users which travel at highly different speeds. The first effect of this step can already be seen in various parts of the country, and pedestrian footpaths as well as cycle tracks are

becoming an essential feature of such structural alteration. In addition, main roads are divided into separate traffic lanes for vehicular traffic in order to decrease further any possibilities of a clash.

Unfortunately, however, the solution in the above-mentioned manner is fraught with difficulties some of which are indeed insurmountable. The process of rebuilding the existing highways first of all, is a very expensive business and for this reason alone development is bound to take a considerable time. In many cases, moreover, particularly where buildings and other private property impedes the prospective extension, these costs become almost prohibitive. Although humanitarian aspects are rated higher than monetary considerations there are limits beyond which nobody can go. If we were to attach an infinite value to human life then it would be impossible to have any transport at all, simply for the reason that even unlimited expenditure could not remove all the causes which are responsible for accidents. But even without going as far as that, the spending power of the authorities in charge of road construction is not unlimited.

Thus, again, there are two reasons which obstruct a quick adjustment of the roads to traffic. The demand for the reduction of accidents, however, is immediate and cannot wait until constructional changes of the highway system have been carried out to a noticeable extent. For that reason the authorities had to decide upon a much stricter control of road use and user. It is at this point that legislation has taken an active part in the attempt to improve the situation with regard to the loss of life on the roads.

Starting from the assumption that the increase of motor vehicles is largely responsible for the rise in accident figures, legislation has concentrated its efforts primarily upon the motor vehicle and its driver. That is to say, as far as the two main factors, man and machine, are concerned the law has attempted first of all to ensure that "the right man drives the right machine in the right manner." He has got to be the right man—that means he has to be physically as well as technically fit to drive or ride a motor vehicle. He must not be physically disabled in such a way as not to have proper control of the car, and under the 1934 Act he must prove that he has acquired the skill of operating it in a manner which conforms with a certain standard laid down.

In addition, the driving of a motor vehicle is only permitted to persons who have reached an age at which they can be assumed to be fully aware of their responsibilities towards other users of the road. As far as physical disability is concerned the last available

statistical analysis seems to show that accidents due to this factor are negligible indeed. During the period of the last report (1936-7) out of a total of 66,982 accidents attributed to drivers only 11, or less than 0.02% of this group, were shown to be due to physical defects of the persons in charge of the vehicle. In 1935 a special investigation attached to the main report on road accidents studied the "condition" of drivers involved in accidents. The rapporteurs came to the conclusion that in 8595 cases out of a total of 8730 in which vehicles were involved the condition of the drivers was "apparently normal." In spite of the ambiguity of this expression we may assume that—to put it into plain terms—there was "nothing wrong" with the vast majority of the drivers and that only a tiny fraction of 1.6% had to bear the stigma of "abnormality."

It is, of course, impossible to say whether the smallness of this factor as a cause of accidents is due more to the legal provisions than to the common sense of the people. Statistical figures can never prove that or hope to do so. *After all, even if accidents should increase subsequent to legal measures it can always be said with some justification, that it would have been much worse but for the intervention of the law.*

As already mentioned, since 1934 prospective drivers of motor vehicles have to undergo a test in order to show their technical skill in operating a motor vehicle in an efficient manner. The question as to whether the introduction of a test could be instrumental in reducing the amount of bad driving and, in consequence, of accidents is certainly one of the most controversial problems. It may be of interest to compare the figures of Great Britain with those of a country in which a test has been in force for a considerable time.

With all the reservations due to any international comparisons of statistics we give below a number of figures relating to the development of the number of motor vehicles and accidents in Germany, where since before the war a very severe test of prospective drivers has been in operation.

	No. of Motor Vehicles		No. of Persons killed		Persons killed per 1000 vehicles	
	Germany	Gt. Britain	Germany	Gt. Britain	Germany	Gt. Britain
1931 .	1,507,129	2,189,650	6767	6691	4.49	3.05
1932 .	1,499,724	2,213,012	6575	6667	4.39	3.01
1933 .	1,562,823	2,271,699	6792	7202	4.37	3.17
1934 .	1,887,632	2,391,059	7934	7343	4.20	3.07
1935 .	2,157,811	2,543,577	8762	6502	4.06	2.56
1936 .	2,474,591	2,706,555	8381	6561	3.39	2.39
1937 .	2,848,466	2,881,034	7624	6586	2.68	2.29

Before 1936 Germany did not publish any annual figures of the numbers of persons injured, thus any comparisons over a longer period but the last two years are impossible. The total numbers for this most recent period are as follows:

	Number of persons killed and injured		Number of persons killed and injured per 100 vehicles	
	Germany	Gt. Britain	Germany	Gt. Britain
1936 . .	182,128	234,374	7.63	8.63
1937 . .	181,500	233,529	6.33	8.11

At an earlier stage it had been pointed out that the introduction of the compulsory insurance may drive up the number of listed injuries. The fact that such a scheme is not in force in Germany may account for the discrepancy in the number of persons injured.

The conclusions that can be drawn from the first table are primarily the fact that a very rapid increase in the number of motor vehicles has taken place in Germany during the last few years. That means that a great number of new drivers have come on the roads. In spite of this result the number of accidents has decreased not only absolutely but also in relation to the increase of vehicles. This may prove on one side that inexperience is not an important factor in the causation of accidents. (In fact, separate investigations carried out on this point in Germany have tended to prove this fact even more than general statistics could possibly do.) On the other side, the stringent test may sift out the bad driver, and the education which the preparation for the test as such presents may leave a considerable impression upon the tyro to be careful in the initial period of his motoring career.

That, perhaps more than anything else, can be described as the purpose of the test. If we look at the figures of test failures in Great Britain since the examination was introduced we will find a very high proportion of persons who failed to qualify for the licence. And although it may prove to be impossible to ascribe the decrease in accidents in this country to this feature alone, it may nevertheless be assumed that it has been of some beneficial influence in connection with such a decrease. In Great Britain the number of persons killed and injured per 100 vehicles has moved as follows:

1930: 8.24	1934: 9.99 (introduction of the test in this year)
1931: 9.54	1935: 8.99
1932: 9.63	1936: 8.63
1933: 9.85	1937: 8.11

The second group of provisions refer to the condition of the

vehicle and equipment. They attempt to ensure that only vehicles in a fit state are driven on the roads. The Minister of Transport under the powers conferred upon him by the Road Traffic Act of 1930 has issued orders which at present are amalgamated in the "Motor Vehicles (Construction and Use) Regulations, 1937." These rules cover a wide field from the efficient conditions of the braking systems to the provision of safety glass. Their main purpose is to prevent any mechanical failure of the vehicle which might lead to an accident. Let us now look for a moment at the statistics of such accidents as are attributed to vehicles or equipment.

In 1936-7, 7,146 or 3.9% of a total of 199,062 were ascribed to this cause. If we analyse the types of mechanical failure or defective features of the vehicle the following facts come to light: 20.5% of the above mentioned figure were due to the failure or defectiveness of the brakes. Almost 10% happened on account of burst tyres, while defects on wheels and steering mechanism take the next two places of importance with 8.8% and 8.2% respectively. The prevalence of these four main causes of this group has led to a tightening up of the regulations in such a way that at present the owner might have to submit at any moment to a thorough examination of his vehicle.

On the whole, however, we can again say that this second group of provisions affects causes of relatively minor importance. The major problems comprise the third group of legislative measures, namely, those which try to ensure that the vehicle is driven in the "right manner."

A clear indication as to what is *not* this right manner is given in the principal Act of 1930 under the provisions which deal with "Reckless and dangerous driving," and with "Driving without due care and attention."

A person must *not* drive a motor vehicle on a road

"recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road. . . ." and

"without due care and attention, or without reasonable consideration for other persons using the road."

Although these wide terms gave sufficient scope for interpretation a change in principle had not been brought about because the provisions were to a large extent taken over from older legislative measures such as the 1904 Act. As the number of accidents,

however, showed no tendency to fall, the government had to decide upon steps which might be of a more preventive nature. In 1930 already speed limits for certain classes of vehicles had been reintroduced. Only private motor cars had been exempted from such a measure. Four years later even the latter class was to be subjected to speed restrictions in, what was to be called, "built-up areas."

There were really two ways in which the rate of travel was to be cut down. One was by the introduction of a general speed limit of 30 m.p.h. in those specified areas, the other, rather indirectly by the marking of certain portions of the roads in which the pedestrian would have priority. The contention was obviously that the knowledge of this priority right of the pedestrian would induce the motorist to proceed slowly in their neighbourhood in order to avoid the stigma of negligence. The intention, namely, that these crossings should act as an additional limit on the speed of vehicles, was already made clear in the discussions of the Standing Committee C, which dealt with this problem prior to the introduction of the Act.

As far as the three main measures taken by the 1934 Act are concerned—Speed Limit, Pedestrian Crossings and Driving Tests—the influence of each individual measure upon an eventual reduction of accidents cannot be separated. With regard to the 30 m.p.h. speed limit on private cars, however, a number of points can be raised.

Seventy-five per cent of all accidents reported in the analysis of 1936–7 happened in areas in which a speed limit of 30 m.p.h. was in force. Even if it is borne in mind that the numerical opportunities of accidents are obviously many times greater in built-up than in non-built-up districts there are only two conclusions possible. The first one is, that speed as such is not the factor of causation it was made out to be when the limit was imposed. Secondly, the opposite, namely, that the limit of 30 m.p.h. is not sufficient. But there is a third point to be considered. Even if the speed limit is 30 m.p.h. that does not mean that vehicles travel continuously at the maximum allowed to them. There may be a certain proportion of motorists who travel at a higher rate, taking the risk of being caught and yet "getting away with it." On the whole, however, the "consequences" will prevent the greater number of drivers from exceeding the maximum. Although London is not a typical example the concentration of great numbers of road users and the considerable proportion of accidents make it to some extent eligible as example. The Bressey report has given clear evidence of the very slow average speed at which

motor vehicles are allowed to move by the circumstances that prevail in London traffic. To some extent, although in a smaller way, these circumstances take effect in all built-up areas, and it may be safely assumed that the average speed in such districts is well below the maximum. The evidence taken from these data is furthermore reinforced by previous records given in reports on accidents before the limit was introduced. Police reports showed that a great proportion of mishaps occur at such low speeds as 15 m.p.h. Though little reliability was placed at the time upon the validity of such statements the effects of the present restriction seem to do anything but to contradict those assumptions.

In further evidence the following facts may be submitted. Goods vehicles were restricted already in their rate of travel in the Road Traffic Act of 1930. The maximum is 30 m.p.h. for light and 20 m.p.h. for heavy goods vehicles. In 1937 there were 487,750 goods vehicles registered in Great Britain of which 42,185 were involved in accidents; that means that out of 100 vehicles registered 8.6 were involved in various occurrences of fatal and non-fatal character. The number of private cars in the same period was 1,834,248 of which 98,385—5.4 per 100 registered—were involved in accidents. Thus we see that commercial vehicles have not fared better, but on the contrary much worse than private cars, which are after all able to travel in unrestricted areas at a much greater speed.

The speed limit seems therefore to have been much less effective than was generally assumed, and it may well be asked whether it has been instrumental in reducing the number of accidents on the roads.

In addition to the legislative measures mentioned a code of "right manners" was issued, and although the road users are not forced to act according to it, it presents a standard of reasonable behaviour with which the motorist is expected to comply when driving on the roads. Although the "Highway Code" is not law it is made quite clear that

"A failure on the part of any person to observe any provision of the highway code . . . may in any proceedings be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings."

Thus, it is advice given with the threatening finger, which is meant to induce the driver to follow the rules of traffic behaviour. In an earlier part we have pointed out this essential feature of road usage, namely, that each user must make it absolutely clear

as to what he is going to do next. The Highway Code simply wants to show to the driver what he has to do to make his intentions clear without the danger of being misunderstood. For this reason alone the Highway Code represents an important contribution towards the attempts of accident reduction.

So much for the motorist.

When we come to consider the legislative measures taken with regard to other road users their absence rather than presence becomes conspicuous. It is true that the pedal cyclist is subjected to certain regulations which refer to his equipment, such as reflectors or brakes. The Highway code also applies to his behaviour on the road and prescribes the methods by which he may announce his intentions. Beyond that, however, he and even more the pedestrian are not very much restricted by the law. This is the more surprising as these two types of road users are responsible—if statistics are an indication of responsibility—for well over 53% of the road accidents and for approximately 48% of fatal and non-fatal injuries. This can be readily understood when we return to our initial argument. The number of traffic units has increased beyond the space available for movement. No doubt, the advent of the mechanically driven vehicle has introduced a highly dangerous factor into the traffic stream. In so far as this is true, the increase of motor vehicles is responsible for the rise in road accidents as against the pre-motoring days. But the placing of responsibility does not solve the problem of reducing the accidents. It is merely an argument which provides material for discussions between various users of the road, and it may give the non-motorist a weapon of fighting against the motorist and trying to place more restrictions upon his movement. If we assume that we want motor cars and we want them to be of the most efficient use to us, then more and more restrictions will tend to reduce this efficiency and use more and more. We arrive here simply at the ultimate problem, namely, the proportion between the things we want and the things we do not want. We want motor cars in increasing numbers with a minimum of accompanying accidents. The increase in numbers almost automatically implies a rise in violent contacts between the vehicles and other users of the road. If the argument holds good that regulation is instrumental in the reduction of accidents, then this argument is applicable to the motorist as well as the other users of the road. If one part of the road using community is subjected to certain regulations while the other is free to do whatever it likes, then these regulations have no chance whatever of being effective. That is, lacking the possibility of separating the various traffic units,

regimentation of one section must necessarily be followed by regimentation of all users of the highway.

We give below some examples from Germany as to the relative responsibility of pedestrians and pedal cyclists and the results may be taken as indicative as to what strict supervision of these other road users may achieve. In 1937 42,145 pedestrians were involved in road accidents, of which 22,711 or 52% were attributed to this class as against 77.5% in Great Britain. The effect of regimentation becomes, however, even more apparent when we relate the number of pedestrians as factors of causation to the total number of traffic units involved in accidents. The total number in which causes were assigned was in 1937: 308,248; which means that pedestrians were responsible in less than 8% of all cases. (Great Britain: 30.5.) The corresponding figures for cyclists was 27,422 or less than 9% of the total. (Great Britain: 22.8%).¹

At the moment of writing a committee of the House of Lords is considering further measures that might be taken against the increase of road accidents. It is to be expected, without doubt, that many of the suggestions will point in the direction of greater control and supervision of the pedestrian and cyclist. If the roads cannot be made to fit the traffic then no other way is possible to fight a future increase of deaths and injuries on the roads. Short of driving the motor car off the roads altogether there is no other measure which could radically be successful.

It must be understood that this study deals primarily with the question of road accidents as far as legislative measures are concerned, which were introduced to reduce the number of such incidents. It is perfectly well realised that there are many more issues involved which might give the problem a different aspect. For the above-mentioned reason the intricate problem as to the priority of the right of movement has not been touched upon. It is about this argument that many of the battles of the various road users are being fought. Similarly with other problems, such as for instance the working of the law in connection with road accidents and others, this article could not deal for lack of space. It must be realised that the legislative aspect is only one of many approaches to this important question.

E. D. WEISS

¹ These figures are not strictly comparable because in Great Britain the number of traffic units involved in accidents is not published. But even if we assumed the same or a reasonably higher number of traffic units for Great Britain the percentage would still be more than twice as in the case of Germany.

RESTATEMENT ON RESTITUTION

RESTATEMENT ON RESTITUTION. American Law Institute, 1937.
\$9.50 net.

The pioneer work of Professor Winfield on Quasi-Contract¹ and the resulting controversy in the *Bell Yard*² were followed by a period of seven lean years in which the only notable contributions to the subject were the article on *The Doctrine of Unjustified Enrichment* by Professors Gutteridge and David³ and Mr. Jackson's *History of Quasi-Contract*.⁴ Whether the next seven years will live up to the biblical precedent is as yet uncertain, but the beginning has been most promising. Three decisions of the Court of Appeal⁵ have reopened the dispute and provoked academic repercussions,⁶ while Lord Wright has written an article⁷ in which he re-examines the *ratio decidendi* of *Sinclair v. Brougham*.⁸ In these circumstances, the appearance of the *Restatement on Restitution*⁹ is most opportune, provided that we are not too proud to take advantage of American learning and experience. The title and the contents of the *Restatement* have been lucidly explained by the reporters, Professors Seavey and Scott, in a recent article,¹⁰ and interesting reviews of it have appeared.¹¹ The latest contribution to the subject is the very comprehensive survey of the *Principle of Unjust Enrichment in English Law*, by Dr. Friedmann in the *Canadian Bar Review*.¹² Certainly, when the centenary issue of the *Law Quarterly Review* appears, it will not be possible to relegate Quasi-Contract to less than a page in the section on Contract.¹³

The most interesting feature of the *Restatement* is that it presupposes the division of Private Law into three branches, contract, tort and restitution. The underlying postulate of the first is that a person shall get what has been promised to him, of the second that a person has a right not to be harmed, and of the third that benefits unjustly acquired shall be disgorged.¹⁴ To the argument that the principle suggested as the basis of restitution is so vague as to be useless, the reporters answer¹⁵ that the same could be said of the basic principles of contract and tort in that the law does not require every agreement to be performed nor does it award compensation for every injury sustained. These principles are not intended

¹ *Province of the Law of Tort* (Tagore Lectures, 1930), Chapter VII.

² Landon, 8 *Bell Yard* 19 (Nov. 1931); Winfield, 9 *id.* 32 (May 1932); Stallybrass, 10 *id.* 18 (Nov. 1932).

³ (1934), 5 *C.L.J.* 204.

⁴ 1936.

⁵ *Craven-Ellis v. Canons Ltd.*, [1936] 2 K.B. 403; *Brook's Wharf and Bull Wharf Ltd. v. Goodman Bros.*, [1937] 1 K.B. 534; *Morgan v. Ashcroft*, [1938] 1 K.B. 49.

⁶ (1937), 53 *L.Q.R.* 302 (Landon), 447 (Winfield), and 449 (Friedmann); (1938), 54 *L.Q.R.*, 24 (Radcliffe), and 201 (Allen).

⁷ (1938), 6 *C.L.J.* 305.

⁸ [1914] A.C. 398.

⁹ St. Paul: American Law Institute Publishers (1937). Pp. xxv and 1033. \$9.50.

¹⁰ *Restitution* (1938), 54 *L.Q.R.* 29.

¹¹ (1937), 51 *Harv. L. Rev.* 369 (Lord Wright) and *Miss. L. J.*, Febr., 1938 (Mr. Jackson). Professor Winfield will contribute a review to the October issue of the *L.Q.R.*

¹² (1938), 16 *Can. Bar Rev.*, 243, 365.

¹³ As was done in (1935), 51 *L.Q.R.* 91, 116.

¹⁴ *Supra* n. 10 at 31-32.

¹⁵ *Id.* at 36.

to provide the solution to individual problems, but rather to indicate the spirit in which those problems should be approached. The position is stated very clearly in the introductory chapter where it is said of the principles of restitution that

"they cannot be stated as rules since either they are too indefinite to be of value in a specific case or, for historical or other reasons, they are not universally applied. They are distinguished from rules in that they are intended only as general guides for the conduct of the courts and are not intended to express that universality of application to particular cases which is characteristic of the statements made in subsequent chapters."¹⁶

This tripartite division is accepted by Lord Wright,¹⁷ but is criticised at some length by Mr. Jackson.¹⁸ As I understand his argument, he does not deny that there is a third category of obligation; to do so would involve a withdrawal from the position taken up in his book.¹⁹ What he does say is that restitution is an unsuitable and unscientific term in that it connotes the remedy given, and not the source of the obligation, as is the case with contract and tort. This is true, and there are further objections. The tortious actions of ejectment and detinue are restitutionary but do not fall under restitution. The term was chosen, as the reporters tell us,²⁰ because it connotes "the right to recover back something which one once had." This, surely, is to base restitution on a property right, a right *in rem*, a proposition which is not universally true. Take the case of the surgeon who "renders services . . . to an unconscious person in an effort to save his life";²¹ restitution here has nothing to do with a right *in rem* but involves the payment of reasonable recompense. In fact, in restitution the primary obligation is *personal*, though often there are cases where an ancillary right *in rem* exists.²² Restitution is an adequate title only for Part II of the *Restatement* which contains the rules for reclaiming or following property. But though one may criticise like Mr. Jackson, one is also forced to admit, as he does, one's inability to think of anything better.²³ The meaning which restitution has in the *Restatement* is

"restoring to a person property transferred by him to another or property of his acquired by another, or paying to him the value of such property or the value of services rendered by him. It implies both a loss by him and a receipt of something by another, although in some cases the amount of loss and the value of that which was received are not equal."²⁴

According to section 1, "a person who has been unjustly enriched at the expense of another is required to make restitution to the other." Throughout the rest of this article, "restitution" and "restitutionary" will be used in accordance with these explanations.

The second point of interest is that Part I of the *Restatement* includes

¹⁶ *Restatement*, p. 11.

¹⁷ (1937), 51 *Harv. L. Rev.* at 369-70.

¹⁸ (1938), *Miss. L. J.*

¹⁹ *History of Quasi-Contract*, 129-30.

²⁰ *Supra* n. 10 at 29.

²¹ *Id.* at 31; *Restatement*, s. 114.

²² *Supra*, n. 10 at 42; *Restatement*, s. 160(a).

²³ The reporters give their reasons for rejecting Quasi-Contract as the title *supra* n. 10 at 38-40. Cf. Winfield, *op. cit.*, 119 and Jackson, *op. cit.*, 127 ff.

²⁴ *Restatement*, p. 522.

all grounds upon which restitution will be granted, whether the action is legal or equitable.

"The principles by which a person is entitled to restitution are the same whether the proceeding is one at law or in equity, although in some cases the limitations which the courts at law imposed upon themselves in rendering a judgment have prevented actions at law where restitution would be allowed in equity, and in many situations a proceeding in equity is denied because the remedy at law is adequate."²⁵

There are certain noticeable omissions from this half of the book such as the absence of discussion of

"the circumstances under which an action can be maintained upon a judgment or for a failure to perform an official, customary, or statutory duty to pay money. . . ."²⁶

Thus a traditional head of quasi-contractual liability in English law is properly left out because it has nothing to do with the basic idea in restitution, namely that of unjust enrichment. Less defensible is the treatment of subjects which properly fall under restitution merely by means of references to other Restatements.²⁷ Part II, which is headed "Constructive Trusts and analogous Equitable Remedies," deals with those situations where the personal right to restitution is buttressed by a property right. There is a very good discussion of the distinction between express and constructive trusts in which Professor Scott demonstrates that the two are not species of the same genus but are separate concepts, even though they are similar to the extent that in both property is held by one person subject to an obligation to convey it to or use it for the benefit of another; they differ as contract and quasi-contract do in that the former arises out of agreement while the latter is imposed by law.²⁸ This linking of constructive trusts and quasi-contract will seem rather strange to most English lawyers, though it is something of a commonplace in America; Dean Pound is quoted as saying in 1920 that the constructive trust affords "specific restitution of a received benefit in order to prevent unjust enrichment."²⁹

These, then, are the outstanding features of the *Restatement*.³⁰ The question immediately arises whether English law can adopt its plan, of which Mr. Jackson has said that if it is correct, "it represents the greatest advance in the classification of obligations that has occurred for many years."³¹ Does English law have anything which corresponds to the third category, namely restitution? We are forced to hark back to the *Landon v. Winfield* controversy³² which followed the publication of *The Province of the Law of Tort*, and which in part resolved itself into a discussion of whether Quasi-Contract is a separate head of obligation from Contract. But Quasi-Contract is only part of what the *Restatement* terms restitution,

²⁵ *Id.* at 4.

²⁶ *Id.* at 2-3.

²⁷ *E.g.*, s. 15 (g), where the reader is referred to the *Restatement of Contract* for the treatment of recovery of money where consideration has failed.

²⁸ *Restatement*, s. 160; *cf. supra* n. 10 at 40 ff.

²⁹ 33 *Harv. L. Rev.* 421.

³⁰ For a fuller account of the contents reference should be made to Lord Wright's review, *supra* n. 11.

³¹ See also *Miss. L. J.*

³² *Supra* n. 2.

and failure to appreciate this has obscured the issue. The restitutionary remedies in English law are three; the action for money had and received, tracing under *Taylor v. Plumer*,³³ and tracing under *Re Hallett's Estate*.³⁴ According to Mr. Landon, there are only two types of obligation, Contract and Tort, and Quasi-Contract falls under Contract;³⁵ where does he classify the right to trace under *Re Hallett's Estate* without a reference to which (to use his own words) "no account of quasi-contractual liability in English law can be complete"?³⁶ He surely will not say that it falls into the category of tort, and how can he put it under contract when it was used in *Sinclair v. Brougham* by the House of Lords to escape from the difficulty created by their refusal to allow the action for money had and received where a fictitious contract could not be implied because it would have been *ultra vires*? Now "the action of money had and received and the tracing order are different names for the true principle that property should not be unconscientiously retained,"³⁷ and if a principle cannot be fitted into the Procrustean bed of Mr. Landon's juristic categories, some alteration of those categories is imperative. In other words, the "dichotomy which has received the approval of generations of lawyers"³⁸ must be abandoned in favour of a trinity.³⁹

The second of these three restitutionary remedies, tracing under *Taylor v. Plumer*, presupposes that the plaintiff's property has been changed into property of another kind which can be identified so that an action of trover will lie for it. The emphasis is on the proprietary remedy of the plaintiff and not the personal obligation of the defendant, which also exists; according to Lord Ellenborough, the plaintiff claims "that of which he never ceased to be the lawful proprietor."⁴⁰ In *Taylor v. Plumer* the other party was the assignee in bankruptcy of the defaulting agent, and it is not at all clear that if the agent had disposed of the securities and bullion to a *bona fide* purchaser for value, the principal would have been given an action *in rem* against that purchaser. The action of trover in this case is based on the fiction that the plaintiff is the owner of the thing which the defendant has bought with the plaintiff's money, and while it is just and reasonable to preserve that fiction as against personal representatives, trustees in bankruptcy and donees, there is nothing to be said for enforcing it against a *bona fide* purchaser. The theory behind the action is that "an abuse of trust can confer no rights on the party abusing it."⁴¹ "Trust" must here be used in a non-technical sense, as the action was at common law before the Judicature Acts, and perhaps we may paraphrase by saying that a person who acquires a benefit through breach of duty must restore it. Thus *Taylor v. Plumer* falls quite naturally under the first underlying principle of the *Restatement*, that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other."

³³ (1815) 3 M. & S. 562.

³⁴ (1879) 13 Ch. D. 696.

³⁵ 8 Bell Yard 19 ff.

³⁶ *Id.* at 23.

³⁷ Chafee, reviewing Hanbury's *Essays in Equity* (1935), 48 *Harv. L. Rev.* 527; cf. Lord Dunedin in *Sinclair v. Brougham*, [1914] A.C. 436, and Lord Wright, *supra* n. 7 at 317.

³⁸ *Supra* n. 35 at 20.

³⁹ Cf. Lord Wright, *supra* n. 7 at 314-15.

⁴⁰ (1815), 3 M. & S. 579; cf. Viscount Haldane in *Sinclair v. Brougham*, [1914] A.C. 418 ff.

⁴¹ (1815), 3 M. & S. 574, per Lord Ellenborough, C.J.

But the scope of this remedy is very much limited by the fact that the right to follow "ceases when the means of ascertainment fail,"⁴² and the means of ascertainment failed at common law when the fiction of a right *in rem* was impossible, *i.e.*, when there was no specific object which could be earmarked as the product of the property of the plaintiff. But the means of ascertainment at the disposal of equity were not so circumscribed and the possibilities of restitution were considerably increased by *Re Hallett's Estate*. It is important to emphasise that this decision did not introduce any new principle of restitution.

"The question always was, Had the means of ascertainment failed? But if in 1815 the common law halted outside the banker's door, by 1879 equity had had the courage to lift the latch, walk in and examine the books. . . . I see no reason why the means of ascertainment so provided should not now be available both for common law and equity proceedings. If, following the principles laid down in *Re Hallett's Estate*, it can be ascertained either that the money in the bank, or the commodity which it has bought, is 'the product of, or substitute for, the original thing,' then it still follows 'the nature of the thing itself.'"⁴³

The identity of the principle upon which the two types of tracing order are based is emphasised by Jessel, M.R., in *Re Hallett's Estate*,⁴⁴ where he approves of the remarks of Lord Ellenborough. The Master of the Rolls also mentions the doctrine of equitable lien under which the plaintiff has a charge on any part of the defendant's property if he can show that his money contributed towards the purchase price. In both equitable lien and tracing under *Re Hallett's Estate*, there is usually no doubt of the defendant's personal obligation to restore, but in view of his insolvency, interest is centred on the proprietary remedy. We venture to use the adjective "proprietary"⁴⁵ even though the rights of the plaintiff are only equitable and so are liable to be defeated by transfer to a *bona fide* purchaser for value; if the suggestion made above about the scope of *Taylor v. Plumer* is correct, the same limitation is placed on the plaintiff's right at common law. In both cases the underlying theory is the same—the restoration to the plaintiff of a benefit unjustly acquired by the defendant.

The tracing remedies which we have been discussing are dealt with in Part II of the *Restatement*, together with subjects which we have not had time to examine such as subrogation and constructive trusts. The scope of these remedies, as Mr. Landon has pointed out,⁴⁶ is still in the process of elucidation, but their nature is clear—they are proprietary remedies which usually are ancillary to the personal remedy of the action for money had and received. But it is impossible

"to say that every person who can in equity establish a right to have his money or the proceeds of his property restored to him, can, as an alternative, bring an action against the person who has been in possession of such money or proceeds for money had and received."⁴⁷

⁴² *Id.* at 575.

⁴³ *Per* Atkin, L.J., in *Banque Belge v. Hambrouck*, [1921] 1 K.B. 335.

⁴⁴ (1879), 13 Ch.D. 717-18.

⁴⁵ *Pace* Dr. Hanbury (*Essays in Equity*, 10). See Chafee, *supra* n. 37 at 529-30, and Scott, *The Nature of the Rights of the Cestui Que Trust* (1917), 17 Col. L. Rev. 269. But *cf.* Stone, *Id.* at 467.

⁴⁶ *Supra* n. 35 at 23.

⁴⁷ *Per* Atkin, L.J., in *Banque Belge v. Hambrouck*, [1921] 1 K.B. 333.

In short, the right to restitution is in some cases quite independent of the right to bring this action and therefore independent of the notion of implied contract, if indeed that concept is necessary in any branch of restitution. The boundaries of the action for money had and received were not fixed in *saecula saeculorum* by the third edition of *Bullen and Leake* in 1868, but still have to be delineated, as the Court of Appeal recently observed,⁴⁸ and there is still controversy about the basic principle of the action. Lord Mansfield's view, expressed in *Moses v. Macferlan*,⁴⁹ is well-known—

"If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract."

To-day there are roughly three schools of thought. On the right are those who maintain that the action is rooted in the fiction of an implied contract and has nothing to do with "natural justice." Among their numbers are Lord Sumner,⁵⁰ Greene, M.R.,⁵¹ Mr. Landon,⁵² and Dr. Hanbury.⁵³ In the centre we find Viscount Dunedin,⁵⁴ Sir William Holdsworth,⁵⁵ Dr. Radcliffe⁵⁶ and Dr. Allen.⁵⁷ perhaps we should add Scott, L.J.,⁵⁸ and Professor Gutteridge.⁵⁹ They say that the action will not lie where it is impossible to imply a contract, but that the principles of natural justice are taken into account in deciding when that contract will be implied. On the left, Lord Wright⁶⁰ and Professor Winfield⁶¹ hold that the fiction of the implied contract is otiose, and that the basis of the action is restitution where it is unjust and unreasonable⁶² for the defendant to retain the benefit he has acquired. Has the implied contract theory any value? Sir William Holdsworth says that it

"gives to the notion of a quasi contract (a) definite element of some kind of relationship between the parties. . . ."⁶³

With all respect, this argument will not hold water. The contract is fictitious—that is agreed on all hands; if the relationship exists independently of the fiction, the fiction is useless, while if it does not exist, the fiction will not bring it into being. But even if the argument were sound,

⁴⁸ Per Scott, L.J., in *Morgan v. Ashcroft*, [1938] 1 K.B. 74.

⁴⁹ (1760), 2 Burr. 1008.

⁵⁰ *Sinclair v. Brougham*, [1914] A.C. 451 ff. But he recognises "natural justice" in another connection; see his dissenting judgment in *R. v. L.G.B., Ex parte Arlidge*, [1914] 1 K.B. 193.

⁵¹ *Morgan v. Ashcroft*, [1938] 1 K.B. 62. Lord Wright's judgment in the *Brook's Wharf* case was not cited to the Court, presumably because it did not appear in the *Law Reports* till after the case was argued, though collateral reports were available at the date of the trial.

⁵² *Supra* n. 35.

⁵³ *Essays in Equity* (1934), 1. Is Dr. Hanbury undergoing a change of heart? Cf. *Modern Equity* (2nd ed., 1937), 57 ff. and (1937), 2 *Toronto, L.J.*, 51, n. 3.

⁵⁴ *Sinclair v. Brougham*, [1914] A.C. 436.

⁵⁵ (1932), *Journal of the S.P.T.L.*, 42.

⁵⁶ *Supra* n. 6.

⁵⁷ *Ibid.*

⁵⁸ *Morgan v. Ashcroft*, [1938] 1 K.B. 75-77.

⁵⁹ *Supra* n. 3.

⁶⁰ *Brook's Wharf v. Goodman Bros.*, [1937] 1 K.B. 545 and *supra* n. 7.

⁶¹ *Op. cit.* at 131 ff.; *supra* n. 6; (1938), 54 *L.Q.R.* 304.

⁶² The twentieth century way of saying "contrary to natural justice."

⁶³ *Supra* n. 55.

we are little better off because we still have to discover in what circumstances the law will allow the action for money had and received to lie, granted that the fiction of a contract can be implied.⁶⁴ The criterion afforded by the implied contract theory is a purely negative one which arbitrarily rules out relief in certain cases without telling us where relief will be granted. Since the fiction is both useless and harmful, can it be discarded? Until last year Professor Winfield alone had dared to maintain this revolutionary thesis,⁶⁵ but he has recently received powerful support from Lord Wright, both in the *Brook's Wharf* case⁶⁶ and in his article in the *Cambridge Law Journal*⁶⁷ in which he re-examines *Sinclair v. Brougham*, and concludes that the implied contract theory is not part of the *ratio decidendi*. Whether this is so or not, we need an additional criterion; we have seen that tracing orders are based upon the principle of restoring a benefit unjustly acquired and this is the basis which Lord Wright gives for the action for money had and received. He says,⁶⁸

"These statements of the principle do not put the obligation on any ground of implied contract or of constructive or notional contract. The obligation is imposed by the Court simply under the circumstances of the case and on what the Court decides is just and reasonable, having regard to the relationship of the parties. It is a debt or obligation constituted by the act of the law apart from any consent or intention of the parties or any privity of contract. . . . The defendants would be unjustly benefited at the cost of the plaintiffs if the latter, who had received no extra consideration and made no express bargain, should be left out of pocket by having to discharge what was the defendants' debt."

The principle of unjust enrichment is a general one and, like all general principles, it is subject to certain exceptions; thus there is no recovery of money paid under a mistake of law,⁶⁹ and until 1935 when the Legislature intervened, there was no contribution between joint tortfeasors.⁷⁰ To point out that practically every other civilised legal system has developed such a principle⁷¹ and, to echo the words of Professor Gutteridge, that in Quasi-Contract "the tendencies have, on the whole, been in a reactionary rather than a progressive direction since the days of Lord Mansfield,"⁷² may lead those who deny the existence of this principle in English law to put one on Koko's list of undesirables as an "idiot who praises with enthusiastic tone every century but this and every country but his own"; still, the risk must be taken. The line-up in this controversy is distinctly reminiscent of an Oxford *v.* Cambridge contest, and perhaps it is not treasonable for the writer to hope that his old University will once more turn out to be the home of lost causes.

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⁶⁴ Cf. Greene, M.R., *supra* n. 51; Scott, L.J., *supra* n. 58; and Winfield, *op. cit.*, 139 ff.

⁶⁵ *Supra* n. 64.

⁶⁶ [1937] 1 K.B. 545. Lord Wright refutes Mr. Landon's interpretation of his judgment (*supra* n. 6) in 6 C.L.J., 323-24.

⁶⁷ *Supra* n. 7.

⁶⁸ [1937] 1 K.B. 545.

⁶⁹ *Bilbie v. Lumley* (1802), 2 East 469.

⁷⁰ Law Reform (Married Women and Tortfeasors) Act, 25 & 26 Geo. 5, c. 30, s. 6.

⁷¹ David, *supra* n. 3 and Friedmann, *supra* n. 12 at 244.

⁷² *Supra* n. 13.

STATUTES

Leasehold Property (Repairs) Act, 1938

This Act furnishes yet another example of a legal reform of considerable social importance introduced by a private Member. The basic object is to prevent the exploitation of tenants by landlords serving on them stringent schedules of dilapidations with the object of forcing the tenants to purchase the reversions under threat of forfeiture or actions for damages. It is unfortunately within the knowledge of every solicitor that schedules of dilapidations frequently refer to repairs and redecorations, many of which the tenant is probably under no obligation to carry out or which, even if he is under a legal obligation to do them, are not really necessary. In the case of a large property let at a rack rent, this does little harm, since the tenant is in as strong a position as the landlord—indeed, while as at present the general tendency is for rents to fall, he is in a stronger position, since he knows that the last thing that the landlord wishes to do is to forfeit the lease. The tenant is able to employ a lawyer and, if necessary, a surveyor to deal with the matter on his behalf, and as a result of negotiations between the parties and their advisers, the repairs which the tenant eventually carries out will probably bear little resemblance to those originally included in the schedule of dilapidations. But as regards small property, the position is very different. The landlord may be a rich man or corporation; the tenant will probably be a poor man who is unable to spend money on professional assistance. The rents of smaller properties have been maintained, and in the case of many leases the rents payable are substantially less than those which could be obtained on reletting. It has therefore not been uncommon, particularly in the provinces, for the landlord to serve on the tenant a lengthy schedule of dilapidations and to indicate that, unless this is complied with or unless the tenant likes to purchase the reversion at a named (and generally excessive) price, steps will be taken to forfeit the lease. Of course, the tenant already has the protection of ss. 146 and 147 of the Law of Property Act, 1925, under which the landlord has to serve a notice specifying the alleged breach, requiring it to be remedied if capable of remedy, and asking for compensation if desired; while even if this notice is not complied with, the tenant can apply to the Court for relief from forfeiture. But the tenant is probably ignorant of his legal rights, and in any case these sections do not apply if, instead of forfeiture, an action for damages is threatened. In such a case his only protection is the rule that the damages recoverable are not to exceed the diminution in the value of the reversion owing to the breach (Landlord and Tenant Act, 1927, s. 18 (1)). Threats of this latter nature are available in a wider class of case, e.g. to long leases under which a ground rent only is payable; these normally contain a right of re-entry only on breach of the covenant to pay rent, but they contain certain, though admittedly limited, covenants to repair, and an action for damages can be threatened on an alleged breach of these.

The new Act which came into effect on the 23rd June applies to houses of a rateable value of £100 or less, held for a term of which five years or more remain unexpired. The Act applies to a house notwithstanding that *part* thereof is used as a shop or office, or for business trade or professional purposes, and it relates to leases whenever created and to breaches of covenant or agreement to put or keep the house in repair during the

currency of the lease, whether the breaches occurred before or after the commencement of the Act.

If the landlord is seeking to recover damages for the breach of such a covenant, he must serve on the tenant a similar notice to that required by s. 146 of the Law of Property Act; in other words, such a notice must now be served, whether the landlord is seeking to forfeit the lease or merely claiming damages. Moreover, this notice must contain a statement *in characters not less conspicuous than those used in any other part of the notice* to the effect that the tenant is entitled under the Act to serve on the landlord a counter-notice claiming the benefit of the Act. In order to enable him to do so, the notice must also contain a statement *in the like characters* specifying the time within which and the manner in which the counter-notice may be served, and specifying the landlord's name and address for service. This counter-notice must be served within twenty-eight days, and when served no proceedings by action or otherwise can be taken by the landlord for forfeiture or the recovery of damages without the leave of the Court (normally the County Court). It will be noticed that whereas under ss. 146 and 147 of the Law of Property Act, a tenant who wants relief must take the initiative by applying to the Court, under the new Act the onus is on the landlord to apply. In other words, the onus is transferred from the presumably poorer and less well-informed tenant to the presumably richer and more-knowledgeable landlord.

The Court may grant the landlord leave on such terms as it thinks fit, but only if the landlord proves—

(a) that the immediate remedying of the breach is necessary for preventing substantial diminution in the value of the reversion or that the breach has already caused such diminution;

(b) that such immediate remedying is necessary in order to comply with legislation;

(c) that such immediate remedying is required in the interest of the occupier;

(d) that the breach can be remedied at an expense which is small in comparison with the expense that would probably be caused by postponement of the work;

(e) that there are other special circumstances rendering it just and equitable that leave should be given.

As a further inducement to the landlord not to serve an unduly onerous schedule of dilapidations, it is provided that if the tenant serves a counter-notice, the landlord cannot recover, under s. 146 (3) of the Law of Property Act, the costs and expenses incurred, unless he applies to the Court for leave to enforce the covenant. If he does so, the Court has power to direct whether and to what extent he is to be entitled to the benefit of s. 146 (3).

By s. 3, the Act is not to apply to a covenant to put the house in repair upon the tenant taking possession or within a reasonable time thereafter.

Diehards may attack the Act on the ground that it is class legislation and a further infringement on the principle of freedom of contract. But it undoubtedly meets, and appears to meet satisfactorily, genuine evils, and most lawyers will wish that it had been made of general application. Besides, every lawyer knows that to talk about freedom of contract in connection with leases is nonsense; not 1 per cent of the people who sign leases realise what the covenants mean, and few lawyers would pretend

that they are able to explain it. The law of landlord and tenant is still based on a mass of case-law overlaid by numerous statutes of different periods dealing with a number of unrelated questions. The law is out of date, obscure, and frequently unjust, particularly to the tenant. The new Act removes certain injustices, but the law of landlord and tenant as a whole can never be made satisfactory until it is codified in one Act, which brings the common law up to date and states it clearly, and which consolidates and modernises the various statutory provisions. This branch of the law affects all classes, from the highest (who admittedly can afford legal advice which *may* be helpful) to the lowest (who cannot); it is inexcusable that it should be allowed to remain in its present chaotic condition.

Increase of Rent and Mortgage Interest (Restrictions) Act, 1938

This Act gives effect to the views of the Ridley Committee (noted at p. 314 of Volume I of this Review) with the exception of the suggested scheme for gradual regional de-control which, as mentioned in the note already referred to, was not adopted by the Government. By virtue of the Act, which came into force on May 26th, the Rent Acts are to remain in force until June 24th, 1942 (and will no doubt continue with further modifications for many years thereafter). But, subject to the necessity for registration with the local authority and notice to sitting tenants, as from September 29th, 1938, houses with a rateable value exceeding £35 in the City of London, the Metropolitan Police District, and Scotland and £20 elsewhere are decontrolled. This is however subject to an important exception in the case of houses at present controlled of which a part was on the 6th December, 1937 (the date of the Ridley Report), sublet and occupied, or vacant and to let, as a separate dwelling. In such a case the rateable value of the whole house shall be treated for the purpose of decontrol as not exceeding the respective amount mentioned above if it would not exceed it after deducting the rateable value of the part so sublet or to let. The object of this is to save from automatic decontrol certain cases where houses are occupied by a number of families, but such houses may still become decontrolled on the landlord's obtaining possession. But except in this and the other case of subletting mentioned in s. 3 (2) of the Act houses may no longer become decontrolled in this way. "Excuse certificates" on proof of reasonable excuse for failure to register houses decontrolled under the Act may be granted by the County Court within one year from the passing of the Act but no "excuse certificate" for failure to register houses decontrolled under the 1933 Act can be made after the expiration of 3 months from the passing of the Act and a person shall not be deemed to have "reasonable excuse" unless his failure was attributable to some cause beyond his control (in other words, ignorance of the legal requirements is not enough).

This Act also contains a number of less important provisions most of which were referred to in the note on the Ridley Report. Apparently, however, no effect is to be given to the recommendation of this Committee and its predecessor that the Rent Acts should be consolidated—a reform which is long overdue.

NOTES OF CASES

Parliamentary Privilege—The Sandys Case

No case concerned with Parliamentary privilege since *Bradlaugh v. Gosset*, 12 Q.B.D. 271, and the events leading up thereto, has given rise to so much public interest as the Sandys Case. Actually there are two quite distinct points involved in this case. Much the more important of these is the problem of the application of the Official Secrets Act, 1911, to Members of Parliament. The substance of this was admirably stated in the *Economist* of 2nd July, 1938, in the following passage: "It is imperative even in a democracy that certain facts which might be helpful to a possible enemy should be kept secret. The Government must be accorded adequate powers to ensure that, in such cases, this secrecy is safeguarded. But it is equally essential, both for the safety of the State and for the preservation of liberty, that the House of Commons and the Press should not be hampered in exercising their traditional right—which is also their duty—of criticism. This function can only be effectively performed if Members of Parliament and journalists are well informed; hence it is part of their day-to-day business to secure information from all possible sources." Few of us would be ready to put journalists upon the same level as Members of Parliament, but otherwise there is not likely to be much dissent from this passage. Its translation into concrete rules is likely to be difficult, as has evidently been realised by the members of the Select Committee of the House of Commons which is considering the matter, and which, as we write, has announced that it will not be able to report until the next session. We hope to discuss this important matter in detail when the findings of Parliament have been announced.

It may be convenient here to recall briefly the main events as they occurred. On Monday, 27th June, Mr. Sandys, M.P., informed the Speaker and the House of Commons that having received certain information as to the state of the preparations against enemy aircraft he had prepared a question on that subject to be addressed in the House to the Secretary of State for War. Considering that it might be inadvisable in the national interest to make publicly the disclosure involved in this question, he had sent it to the Secretary of State with a covering letter asking whether there was any objection to its being put. Instead of answering this communication, the Secretary of State, who had formed the opinion that there had been a breach of the Official Secrets Acts, 1911 and 1920, after consultation with the Prime Minister, placed the matter in the hands of the Attorney-General. The latter minister had thereon sent for Mr. Sandys and attempted to extract from him the source of his information, employing what at first blush appeared very like a threat to make use of the Acts in question against Mr. Sandys himself, though when Mr. Sandys took a firm stand his attitude had become less aggressive. After informing the House of these facts, Mr. Sandys proceeded to raise the whole question of privilege of Parliament in relation to the Official Secrets Acts, and gave notice of motion to refer the matter to a select committee. The Prime Minister accepted the notice, and indicated that he proposed to ask the House to appoint such a committee, and this was of course eventually done.

It may perhaps be suggested that in adopting the procedure just referred to the House has got hold of the less important end of the stick. The Sandys case is just a further piece of evidence that the executive has

come to realise that it has in the Official Secrets Acts, 1911 and 1920, a much more powerful weapon than had been appreciated. *Lewis v. Cattle* (1938), 54 T.L.R. 72, (see MODERN LAW REVIEW, Vol. 2, p. 73) brought the world of journalism up sharp against this unpleasant fact. The Sandys case has brought politicians to a realisation that the journalists had a grievance. Meanwhile a recent case before a Metropolitan magistrate, in which a bookmaker was fined under the same Statute for making wrongful use of an accommodation address, has shown that it can be used to strike in most unexpected places. It is clear that the Act is being used in ways never within the contemplation of the legislature, and the real solution would appear to lie in the direction of a non-party committee to investigate the scope of the Act, and to make recommendations for its amendment. The Act is a criminal statute and it would be breaking new and dangerous ground to confer immunity from the criminal law upon Members of Parliament.

The second point involved is the less important one of the summons of Mr. Sandys before a military Court of Inquiry. Before the matter was raised in the House of Commons the Army Council had apparently decided to set up a Commission to inquire how the leakage had occurred. This was announced in the Press on the day following Mr. Sandys' first statement to the House (Tuesday, 28th June). On the next day, Mr. Sandys, who is a second lieutenant in the anti-aircraft forces, informed the House that he had been summoned to appear in uniform before the Commission to give evidence. He claimed that as the summons was served on him while the matter was under the consideration of Parliament, there had been a breach of privilege. The Speaker ruled that this was *prima facie* so, and remitted the matter to the Standing Committee on Privilege, which soon reported that there had in fact been such a breach, but refused to censure the Army Council.

The House was later informed that the summons to Mr. Sandys had not in fact been issued by the Army Council as had been assumed by the Standing Committee, and the matter was referred to the Select Committee to examine again in connection with their main subject of inquiry. We may nevertheless enquire into the chief features of the case as they appear from the statements made in the House.

In the first place, it is not too clear what head of privilege was broken, although it seems usually to have been considered that it was that defined by Erskine May (13th edn., p. 119) as "the paramount right of Parliament to the attendance and service of its members." That is to say the breach consisted in the summons to Mr. Sandys to attend the Military Court at a time when Parliament was in session. This appears from the statement of the Prime Minister to the effect that the purpose of the privilege rules is to ensure that members shall not be hampered in their duties by outside demands for their attendance. The sovereign Parliament naturally has the first call upon the time of its members. There was clearly a technical breach of this privilege, but in practice Parliament has not for some two centuries insisted upon the immunity of its members from attendance in Civil Courts, though no doubt such a summons still amounts in theory to a breach of privilege, and according to Erskine May (*ubi supra*) any attempt to punish a member for refusal to obey such a summons would appear clearly to be a breach of privilege. In a normal case it would be clearly absurd to draw any distinction between attendance at a Civil Court and a Military Court.

It was, however, suggested that the breach of privilege lay in the fact that a Member of Parliament was summoned to assist in the investigation of a matter which was at the same time under the consideration of Parliament itself. There would appear to be no Parliamentary privilege which prevents an outside body investigating some question which is before Parliament, and a claim to such would clearly be very dangerous. At the same time, Parliament is a Court, and in any actual conflict of jurisdiction must have precedence over inferior courts such as a Military Court of Inquiry. It does not appear on the facts that the Military Court sinned in this respect. The specific complaint made by Mr. Sandys on 27th June was not of course referred to a committee, but only the general question of Members of Parliament in relation to Official Secrets. The military commission was therefore not engaged upon the same inquiry as the Select Committee, so that it could again be argued that the breach of privilege was no more than technical. Moreover, it would appear that at the time when the summons was issued as opposed to the time of its service, the matter had not gone very far in Parliament, i.e. the issue seems to have taken place soon after Mr. Sandys had given notice of his motion for the appointment of a committee, and the statement of the Prime Minister that he proposed, at some future date, to invite the House to set up a committee to inquire into the general question. It was no doubt on these grounds that the Standing Committee exculpated everyone from blame in connection with the breach of privilege which they found to have taken place.

It might of course be contended that the Select Committee and the Military Court, though investigating different matters, were nevertheless both likely to require the assistance of Mr. Sandys in connection with their inquiries, and that the breach of privilege lay in the attempt to deprive the Select Committee of his services. This, however, seems rather a far-fetched view of the matter.

It is therefore on the accepted rules somewhat difficult to establish anything more serious than a technical breach of privilege. Unfortunately, the Standing Committee gave no reasons for its finding, and it may be argued that the absence of censure indicates the view that nothing more than a technical breach had occurred.

It is submitted that a wider view of Parliamentary privilege is necessary. Rules which were laid down in the Middle Ages for securing the attendance of members are only partially adequate, if adequate at all, for dealing with modern problems. The gravamen of the charge in the present case was that the executive through the Attorney-General had threatened to use the Official Secrets Acts against a Member of Parliament if he refused to disclose the source of certain information. Meeting with a stiff resistance they thought it politic to draw back from that particular line of attack, which would clearly have raised the issue of privilege in an acute manner. The fact that Mr. Sandys was an officer in the army, however, appeared to furnish an indirect method of compelling him in that other capacity to disclose information which in his Parliamentary capacity he had claimed to be privileged. Such an attempt ought to be a breach of privilege, and a reprehensible one. It is a pity that, as appears to be clearly established (cf. Erskine May, *Parliamentary Practice*) no new head of privilege can be created. This case clearly shows the need of greater elasticity. It is submitted that Mr. Sandys' case is eminently one which calls for such an innovation.

R. S. T. C.

Demanding with Menaces—Claim of Right made in Good Faith

The report of the proceedings in *R. v. Bernhard*, [1938] 2 K.B. 264, should interest two classes of persons, those who believe in the infallibility of judges and those who talk of the abolition of the criminal jury. The charge against the prisoner was that she had demanded money with menaces from the prosecutor with intent to steal, contrary to the Larceny Act, 1916, s. 30. It was clear from the evidence that the prosecutor had had an illicit association with the prisoner and that *some* agreement had been made between the parties in respect of it, though there was a conflict of evidence concerning its terms and, particularly, about the amounts and the dates of the promised payments. Lord Hewart, C.J., appears to have made up his mind very resolutely that the terms of the agreement could not possibly support the alleged belief of the prisoner that she was entitled to the payment of a lump sum at the date when she menaced the prosecutor. This was one of the reasons why the conviction was quashed by the Court of Criminal Appeal, who considered that there was no doubt that there was material before the jury upon which they were entitled to find that the prosecutor had promised to pay a lump sum at the material date. The Court, very, very politely, remarked, "But however strong, and however well justified, may be a judge's view that there is a preponderance of evidence against the defence of a claim of right, the question whether that defence is negatived by the evidence must be left as a question of fact to the jury." This contrasts strongly with Lord Hewart's final direction to the jury that he hoped they thoroughly understood that he was directing them "as a matter of law."

But this was not the most serious misapprehension entertained by his Lordship, for it is clear from the terms of his summing-up that he had badly misdirected himself on the nature of "a claim of right made in good faith" which figures so prominently in the definition of larceny in s. 1 of the Act of 1916, a definition which is of prime importance in the interpretation of s. 30, with its reference to "intent to steal." He declared that "there cannot be a claim of right in good faith—if the claim is one arising out of an immoral consideration." Then an obstinate, but obviously intelligent, jurymen gave him an opportunity to reconsider the matter by forcing the foreman to return into Court for a further direction from his Lordship, who again said, "You cannot have a claim of right where the circumstances are such as to exclude the possibility of a legal claim." The foreman gave his Lordship a last opportunity by saying, "I want your Lordship's guidance so that this one juror should have his mind cleared. I understand that his belief is that, if the prisoner thought she had a claim, that would make a verdict of guilty of blackmail an incorrect verdict." To this Lord Hewart replied, "That is the kind of fallacy with which I have been endeavouring to deal. If a person thinks two and two make five, that gives rise to nothing but error. The question is not whether she thought something or other. The question is whether on the materials it was open to her to think she had a real claim of right and made in good faith. In other words, a person cannot make a right by thinking she has one." This overcame the opposition of the obstinate, but intelligent, jurymen, and the prisoner was convicted.

But that is not the last we hear of the obstinate, but intelligent, jurymen, for the Court of Criminal Appeal has enshrined his memory in its judgment by stating that "the proper answer to the question which

troubled at least one of the jury would have been that if the prisoner honestly thought that she had a claim, she was entitled to be acquitted, even though she was wrong in so thinking. If the matter were *res integra* there would no doubt be much to be said for the view which found favour with Lord Hewart, C.J., that the words 'claim of right' cannot be read as including a claim which is unfounded in law. We are, however, bound by a long series of decisions, many before, and one at least subsequent to, the Larceny Act, 1916, to hold that this view is incorrect, and that a person has a claim of right, within the meaning of the section, if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact. The material words in s. 1 of the Larceny Act, 1916, are declaratory of the common law, and a long and unbroken chain of authority supports this proposition."

The Court then proceeded to point out that a promise made in consideration of the cessation of an illicit cohabitation, or in consideration of past illicit cohabitation, or by way of compensation for seduction, is not made for an immoral consideration and is void merely for want of consideration; if made under seal, it *prima facie* constitutes a valid contract. The Court added, "It is, we think, plainly impossible to found any argument against the existence in the appellant's mind of an honest belief in the justice and legality of her claim upon her failure to appreciate the distinction which an English lawyer would have drawn between the legal results of a parole agreement and an agreement under seal. It is indeed by no means clear that the validity of the agreement, which was made in France, should be held to depend on the law of England, but, as no evidence was called as to the French law applicable in such a case, it is impossible (as indeed it is unnecessary) for us to inquire whether according to French law the appellant might have maintained an action against the prosecutor." Counsel for the Crown made a faint attempt to justify Lord Hewart by suggesting that some support for his view might be found in the decision in *R. v. Dymond*, [1920] 2 K.B. 260, but, as the Court pointed out, "the judgment delivered by Lord Reading, C.J., made it clear that the question then before the Court was being determined solely by reference to the precise words of s. 29 of the Larceny Act"—which contains no reference to "intent to steal."

Apart from the question of law involved, this judgment is noteworthy for two reasons. The first is the politeness of its terms, which contrasts with the vigour of the language sometimes used by our appellate tribunals when justices of the peace have fallen into error. The second is that the full judgment was not delivered without consideration of its terms. In another place, we have criticised the Court of Criminal Appeal on the ground that "on many occasions when it should have reserved its judgments for consideration it has failed to do so and to enter into as full a discussion of the law as the occasions warranted"—*The Nineteenth Century*, Vol. 121, p. 538.

Although it is quite clear that in order to bring a case within s. 30, "the demand, if successful, must amount to stealing" (*Archbold*, 30th Ed., p. 702), it must be admitted that the terms of ss. 29-31 are apt to be confusing. S. 29 speaks of "without any reasonable or probable cause," in relation to which, it is commonly said, the belief of the accused affords no defence, whereas such a belief is obviously relevant to "the intent to steal" in s. 30. Again in two subsections of s. 29 there is a reference to "intent to extort any property or valuable thing," a reference not found in

s. 30, which speaks of "intent to steal," but found in s. 31, which also refers to an "intent to induce any person to confer or procure for any person any appointment or office of profit or trust." The books have little to say on "intent to extort," save for Kenny's footnote (15th Ed., p. 256) to the effect that the Recorder of London held in 1932 that "there can be an intent to extort, if there is a threat, even though there is an honest belief that a debt is due." The variety of the different modes of conduct set forth in these sections is also highly complex and confusing. The three sections reflect the haphazard history of blackmailing offences in English law (for which see Stephen, *Hist. Cr. L.*, Vol. III, p. 149) and give additional point to the regrets of the editor of Stephen's *Digest* (7th Ed., p. vi) that the committee of unimpeachable authority which drafted the Larceny Act, 1916, was not given wider terms of reference. Although the provisions of the Draft Criminal Code were curiously incomplete, in form and arrangement they were superior to those of the Larceny Act (see *B.P.P.*, 1878-9, Vol. 20, pp. 29, 125).

D. R. S. DAVIES

Workmen's Compensation

McLaughlin v. Caledonia Stevedoring Company Ltd. 54 T.L.R. 910.

The Courts have frequently had difficulty in interpreting the provision in the Workmen's Compensation Acts, which provides that partial incapacity can in certain circumstances be treated as total incapacity, but the difficulties raised by the Court of Session in *McLaughlin v. Caledonia Stevedoring Company Ltd.* are, one would respectfully suggest, self-made and it is not easy to understand, in view of the plain language of the Statute, why or how the Court of Session took the wrong path. Their treatment of the matter seems to be due to the fact that there has been such an enormous amount of litigation in the field of Workmen's Compensation and such an excessive amount of ingenuity shown by insurance companies in resisting claims on every possible ground, good or bad, that the Courts themselves no longer find it easy to look at the legislation in a simple, straightforward manner.

The Workmen's Compensation Act, 1925, as applied to Scotland, formerly provided that "If a workman who has so far recovered from the injury as to be fit for employment of a certain kind proves to the satisfaction of the Sheriff that he has taken all reasonable steps to obtain, and has failed to obtain, such employment, and that his failure to obtain such employment is a consequence, wholly or mainly, of the injury, the Sheriff shall order that his incapacity shall, for the purposes of this Act, continue to be treated as total incapacity for such period, and subject to such conditions, as may be provided by the order, without prejudice however to the right of review conferred by this Act." Under this section the workman had to prove that he had taken all reasonable steps to obtain suitable employment before his partial incapacity could be treated as total. As the result of a decision of the House of Lords, the law was amended by the Workmen's Compensation Act, 1931, to read as follows:

If a workman who has so far recovered from the injury as to be fit for employment of a certain kind has failed to obtain employment and it appears to the Sheriff either—

(i) that, having regard to all the circumstances, it is probable that the workman would, but for the continuing effects of the injury,

be able to obtain work in the same grade in the same class of employment as before the accident; or

(ii) that his failure to obtain employment is a consequence, wholly or mainly, of the injury;

The sheriff shall order that the workman's incapacity shall be treated as total incapacity resulting from the injury for such period, and subject to such conditions, as may be provided by the order, without prejudice, however, to the right of review conferred by this Act;

Provided that—

(i) no order shall be made under this subsection if it appears to the Sheriff that the workman has not taken all reasonable steps to obtain employment.

In the present case the appellant lost two of the fingers of his left hand as the result of an accident and was paid compensation as for total incapacity until April, 1927, and as for partial incapacity from that date until 14th April, 1928, when payment was suspended because the workman was working as a hatchmouth man and earning as much as his pre-accident earnings as a general dock labourer. McLaughlin became unemployed in January, 1932, and in May, 1935, he claimed that his incapacity should be treated as total incapacity. The arbitrator awarded him the full amount, and in a case stated raised the question whether he had acted rightly in holding that the onus lay on the employers to show that the workman had not taken all reasonable steps to obtain employment. The Court of Session held that his action was wrong and allowed the appeal. The House of Lords unanimously reversed the decision of the Court of Session and also disapproved a series of decisions by the Court of Appeal bearing on the same question.

Lord Atkin explained that the word "appears" in the proviso to Section 1 of the Act of 1931 means exactly what it says and nothing more: namely, that the evidence must demonstrate to the judge that the workman has not taken all reasonable steps to obtain employment. If this is shown by the evidence either of the employer or of the workman, then the condition laid down in the proviso is satisfied, and no order can be made, but in the absence of such an "appearance" to the judge the order must be made where the two previous conditions in Section 1 (1) have been fulfilled. Nothing whatever, said Lord Atkin, is implied by the proviso as to the burden of proof. There is no onus lying either on the workman or on the employer. If the employer desires to bring the proviso into operation he must of course see that the evidence will satisfy the judge, but nothing more than that is to be inferred. In the present case there was nothing to show that the claimant had not taken all reasonable steps to obtain employment. The Sheriff was therefore right in holding that the claimant having satisfied the other conditions was entitled to an award of full compensation for total incapacity.

W. A. ROBSON

REVIEWS

RESTATEMENT ON RESTITUTION. American Law Institute. See Article by D. W. LOGAN, above page 153.

CONSTITUTIONAL LAW OF ENGLAND. By EDWARD WAVELL RIDGES. Sixth Edition, by A. BERRIEDALE KEITH, D.C.L., D.Litt., LL.D., F.B.A. London: Stevens & Sons, Ltd., 1937. 21s.

When Mr. Wavell Ridges first published his *Constitutional Law of England* in 1905, the recent Australian federation and conquest of the Transvaal and Orange River Colonies induced him to make a more extended treatment than he originally intended. Part VI, entitled "Countries Subject to the Laws of England," has since become Part IX, entitled "The British Empire," and as the book also contains a considerable amount of history—notably in relation to Parliament, the Cabinet and Departments of State, and the Courts—it has a much wider scope than might appear from its title. The popularity of the book may be gauged from the fact that a new edition was called for so soon after Professor Berriedale Keith's Fifth Edition of 1934, and that, though this edition contains 642 pages royal octavo compared with the 603 pages demy octavo of the last, the publishers have been able to reduce the price from 25s. to 21s. The more than generous index has grown from the 29 pages of the First Edition to 100 pages.

The main changes between this and the last edition arise out of the abdication of King Edward VIII, the Regency Act, and the new Coronation Oath, all raising the question of the divisibility of the Crown and its relations to the Dominions; the new constitutions of India, Burma, and Eire; and the Status of the Union Act, 1934. The chapter on the Dominions has been enlarged, and a new chapter inserted on British Burma. New Zealand seems to have such a sensible constitution that a special section is not thought necessary for that very loyal Dominion. The number of paragraph headings in the text has been increased, leading to a fuller table of contents. Otherwise no change has been made in the arrangement of the book. The short treatment of Local Government in England and Wales remains in the extraordinary place to which it was assigned in the first edition, as if England were a different country from the counties and boroughs of which she is composed and to which English constitutional law has somehow been extended. Those who know the second volume of Anson, however, may be prepared for this shock. The author accepted Dicey's definitions of laws and conventions and adopted Dicey's "rule of law" as a leading characteristic of the English constitution. Impartial recognition is given by the learned editor to administrative law as part of constitutional law, though wisely no attempt is made to expound the English constitution as if they were separable topics. It goes without saying that Professor Keith has brought the material up to date, and that he mentions in the Preface constitutional issues that arose after the book went to press, in particular, the results of the Imperial Conference, the Royal Commission on Palestine, the social credit policy of the Government of Alberta, the Civil List Act, and the Montreux Convention.

The following minor criticisms and suggestions may be submitted. The term "public officers" (pp. 27-8) is not precise as they may or may not be servants of the Crown; also fuller explanations might have been given of *Macbeath v. Haldimand*, where the defendant contracted as agent,

and of *Fisher v. Corporation of Oldham* (p. 431) to which a non-consequential reference is given in note (d) of p. 28. The reader would benefit from some discussion of the juridical nature of Parliamentary privileges (p. 56), and of the legal meaning or meanings (if any) of the term 'civil servant' (p. 171). The separation of powers is contrasted, not with concentration of powers, but rather inelegantly with "combination of functions" (p. 176), and it may be noticed that quasi-executive functions are added to the list of functions which, according to one school of thought, we are expected to distinguish (p. 254). The classification of the forms of action (remaining from the first edition) suggests that trover was not an action of trespass on the case, and might also be taken to imply that all actions of case were derived from trespass (p. 276). The description of the Church of Ireland as "The Church in Ireland" (pp. 371 *et seq.* and p. 434, note (f)) is not warranted either by the Irish Church Act, 1869, or by official practice in Ireland. "The Archbishop" referred to on p. 372 as chosen by the bishops is presumably the Primate. The reader might infer that there were no County roads since April, 1937, and it is inconvenient that the fullest reference to the local administration of education should come under the heading of District Councils (p. 421). By virtue of the Representation of the People Act, 1918, the burgesses or citizens are not the ratepayers but the local government electors, and borough councillors are elected by the local government electors (p. 422). No account is given in Part IX, Ch. 1 of committees in local government or of local government officers. The rule for determining the result of a referendum under Art. 47 (2) of the Constitution of Eire would be made more clear if "voters on the Register" were substituted for "voters" (p. 464, line 6). Though not more than two members of the government of Eire may be members of the Seanad (p. 466), every member of the government has the right to attend and be heard in each House of the Oireachtas. Professor Keith complains that by Article 37 of the new constitution of Eire the "rule of law" in Eire "is seriously undermined," and that Article 40 (6) is "suggestive of inroads on freedom of speech and writing" (pp. 465-6): this merely shows the impossibility of accepting Dicey's doctrine even as a general criterion of political action, for successive governments of Eire representing both of the leading rival parties have found military tribunals necessary for their country, while to deny the limits imposed by Article 40 on the "freedom of the Press," etc., would lead to political and moral anarchy. The learned editor says that Article 49 of the same Constitution, formally vesting in the people all the powers and prerogatives of the Crown prior to 11th December, 1936, was hardly necessary (p. 468); but the reader may be reminded that the Executive Powers (Consequential Provisions) Act, which was passed in May, 1937, when Mr. Buckley's term of office as Governor-General had expired and the new Constitution was still in embryo, vested all such residuary powers in the Executive Council. It would be a concession to the student to give the short titles of Acts of Parliament in the List of Statutes, and also in the text wherever possible. Thus the reader is told that the Administration of Justice (Miscellaneous Provisions) Act, 1933, makes a declaratory action available for estate duty issues (p. 27) and provides for summary determination by the High Court of an applicant's liability in respect of death duties (p. 236), while for the more important changes in procedure relating to prerogative writs he is referred only to 23 and 24 Geo. 5, c. 36. Incidentally, the reference in the List of Statutes to this Act is not to be found on p. 227, and references to

the Incitement to Disaffection Act, 1934, on pp. 403, 404, and 414, are not given in the List. Similarly, the unlearned reader of Part III, Chaps. 5 and 6, might not easily identify "Parl. Paper, Cmd. 4060" until he came to p. 199, and curiously enough the reference on this page is not given in the index under "Committee on Ministers' Powers." The natural tendency of the book to grow from edition to edition might be offset by further pruning, for example, of details in the history of procedure and actions (especially the description of ejectment and fines and recoveries), and details of those items of revenue which are not of constitutional significance.

We have found very few misprints, and they are mostly unimportant: p. xiv, for "Edward III" read "Edward VIII"; p. 58, line 22, insert "as" after "access"; p. 186, line 31, for the first "or" read "of"; p. 339, note (e), for "beats" read "beasts"; p. 398, line 2, for "she" read "he"; p. 404, line 9 of note (b) should read "At Common Law the police *may* search . . ."; p. 421, line 19, for "Geo. V" read "Geo. VI"; p. 433, line 32, for "has been renounced" read "was renounced"; p. 461, line 17, for "Saorstád" read "Saorstát"; p. 467, line 37, delete comma after "neutral." It may be due to a typographical difficulty that in references to Articles of the constitution of Eire sub-paragraphs are not distinguished from paragraphs; however that may be, note (u) of p. 465 should refer to Art. 40 (4) (iii), and on p. 467 note (m) should refer to Art. 44 (2) (ii) and (iii), note (n) to Art. 44 (2) (iv), and note (o) to Art. 16 (2) (v).

Professor Berriedale Keith's views on some outstanding problems may be mentioned. He considers that the use of Orders in Council to impose sanctions against Italy in 1935-36 and to alter the Coronation Oath in 1937 was in breach of the "rule of law" (p. 26): he has no doubt that the Crown descends to the eldest daughter alone and her issue to the exclusion of younger daughters (p. 107), or that the Foreign Enlistment Act, 1870, applies to both parties in a *de facto* civil war (p. 307); he maintains that the prescription, administration and taking of the Coronation Oath in 1937 were clearly illegal (p. 108, note (x) and p. 141), that Mr. Ramsay MacDonald acted unconstitutionally in 1931 in retaining office behind the backs of his colleagues (p. 142, note (h)), and that the Italian conquest of Ethiopia cannot *de jure* be recognised by the United Kingdom without either violation of Article 10 of the League Covenant or alteration of the Covenant to allow of the destruction of Ethiopian membership (p. 504); he suggests that in certain circumstances the King may refuse to grant a dissolution (p. 140), and that a Dominion probably has no right of unilateral secession from the British Commonwealth (pp. 447 and 467); he has doubts concerning the legality of the Constitution (Removal of the Oath) Act, passed by the Free State legislature in 1933 (p. 460, note (u)); and he describes the divisibility of the Crown as in a sense a *fait accompli* (p. 472). The abdication of King Edward VIII suggests to him that a modern Ministry has quasi-dictatorial powers (p. 13), that the King's choice of a consort must by convention be approved by his ministers (p. 114), that the refusal of the style of Royal Highness to the Duchess of Windsor is without precedent and based on false analogy (p. ix), that the position of the Crown has been gravely weakened and that the Crown may prove to have been reduced to mere ornamental and symbolic functions (p. 141); while the taking of the Coronation Oath in 1937 makes him doubt the possibility of the Crown continuing to serve as a safeguard to the Constitution (p. 141). Professor Keith occasionally gives us his opinions on such extraneous topics as the "unwise" project for the building of an

aircraft factory at Maidenhead, the doubtful propriety of the continued establishment and endowment of the Church of England, and the "quite excessive" Governmental share of the cost of purchase of the Codex Sinaiticus.

Though Ridges may not be entirely satisfactory as a first introduction to the general principles of the English constitution, if indeed it is intended to serve that purpose, Professor Berriedale Keith's mastery of materials and unrivalled knowledge of British constitutional law and practice ensure that his editions will continue to provide the student with an invaluable mine of information such as is not to be found elsewhere outside his edition of Anson and his own voluminous writings.

O. HOOD PHILLIPS

PRINCIPLES OF THE LAW OF CONTRACT. By the RT. HON. SIR WILLIAM R. ANSON, Bt., D.C.L. Eighteenth Edition by JOHN C. MILES, Kt. M.A. B.C.L., and J. L. BRIERLY, D.C.L. Oxford, Clarendon Press. 15s.

Authors or editors of textbooks on the Law of Torts, the last edition of which appeared in 1929, would be faced with the task of at least partial re-writing. The law of Contract is in smoother waters. No openly revolutionary changes have occurred in the last eight years. Accordingly the editors of Anson have adhered to their old principle of preserving the structure of the book and carefully and cautiously registering new decisions or other developments. But the Law of Contract is not so untouched as it might appear at first sight. The changes lie not so much in the substance of individual rules as in the general place and function of contract in modern social and legal life. Freedom of contract is supposed to be the basis of the English law of contract. But that freedom is only a shadow of its former self. The growing complexity of the social organism necessitates more and more State interference in matters formerly private. Numerous statutes affect private contracts. In various ways compulsory third party insurance (cf. the articles by Mr. Hughes and by Professor Chorley in the last two numbers of this Journal), the Workmen's Compensation Acts, the Marketing Boards make a profound difference in the principles as well as in the technique of contract, while those branches of the law of contract that are particularly subject to the changing trends of public policy, like restraint of trade, are bound to be much influenced by different conceptions on freedom of trade, monopolies, restriction of production, etc.

In all these respects Anson's Contract is still almost entirely a nineteenth century, not a twentieth century book. Since it is still the leading textbook for students, that is a matter for great regret; for, as it stands now, it is bound to give the student an incomplete idea of the function of Contract in the legal system of to-day. It is submitted that this could be remedied without altering the general structure of the book. Some general chapters on such fundamental matters as freedom of contract, freedom of trade, public policy (which at present is only given some rather sketchy observations on pp. 224-25), and the influence of statutory legislation on contract should preface the detailed chapters. This would not only show the law of Contract in its proper scope but would greatly facilitate the understanding of many special problems of contract. That it would involve the taking into account of certain fundamental social and economic trends of our time, can hardly be regarded as an objection. On the contrary, the present

edition of Anson seems to afford an example how the neglect of these matters in a purely analytical book has the danger of overlooking developments decisive for the lawyer no less than for the economist or sociologist or politician.

Two more suggestions of a general character might be added: The first is that a cautious use of comparative law would help to understand some important principles of English contract, damaging though a superficial use of the comparative method might be. Two examples might be mentioned—

The rule established in *Adams v. Lindsell* and *Household Fire Insurance v. Grant*, which throws the risk of a delay or loss of a posted acceptance on the offeror can hardly be adequately explained by the reasons put forth in these cases. The reason is one of practical convenience and can be justified as balancing the risk thrown on the offeree by the liberty of the offeror to revoke an offer made without consideration. Continental systems make the acceptance valid only with communication, but on the other hand, give no right to revoke an offer. (Cf. Nussbaum in *Col. L. R.* 1936, p. 920.)

Again, in view of the Report of the Law Revision Committee and other recent discussions on Consideration, some observations on the continental *causa* would be very useful and also throw light on some other problems, e.g. that of unjust enrichment in English Law.

The second suggestion is that the editors of Anson might follow the example of the leading textbooks on Torts and quote the most important literature. This is an easier task than in the law of torts, and it would greatly help the student. A reference, for example, to recent articles on Public Policy, or on the problems centring round *Bell v. Lever*, would be very helpful.

As for the work of revision, it appears to have been admirably done. The excellent account of *Bell v. Lever* and of new developments in the assessment of damages might be specially mentioned. In some remarks the learned editors show how well they would be equipped to give an account of the more fundamental evolutions in the law of Contract (c.f. in particular the excellent note on railway tickets and similar contracts; for a new edition, the editors might derive valuable assistance from Dr. Prausnitz' recent study on the standardization of contracts). The chapter on restraint of trade would gain if the cases dealing with price fixing, monopolies, etc., were treated separately from the cases of sale of goodwill and agreements between employers and employees. They have a different economic and social background, and accordingly the test of reasonableness in the interest of the public has a rather different significance, although the decisions, until very recently, have not given much guidance on this matter.

The recommendations of the Law Revision Committee on Consideration are noted, without comment.

The brief chapter on Quasi-Contract, which the editors add to the book as a kind of Appendix, is still inadequate. That will continue to be the fate of this Cinderella of the Common Law, until there are textbooks on Quasi-Contract. Until then, authors on Contract or Tort will treat it inadequately if at all. The considerable new literature on this subject has appeared mainly after the publication of the present edition (cf. Mr. Logan's review on the American Restatement on Restitution, above, p. 153).

There is no doubt that Anson's Contract, in the present edition, will

continue to be the leading textbook on contract. All the more it is to be desired that his distinguished editors might see their way to abandon, at least to some extent, their attitude of extreme reserve and give some fresh vigour to the old and venerable body.

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LAW OF GAMING. By H. A. STREET. London: Sweet & Maxwell, 1937. L and cviii and 760 pp. 42s.

It would tax the ingenuity of the worthy Dr. Pangloss to discover the *raison suffisante* of the English Law of Gaming. English judges have been unsparing in their strictures on this most confusing and illogical branch of our law.¹ According to the late Mr. Justice Swift: "The betting laws of this country are in a tremendous mess, and something ought to be done about it, but nothing is done. Nothing will be done. It is a hopeless mess, and everybody is afraid to touch it."² And Mr. Justice McCardie wrote: "I doubt if any branch of our law presents so curious a degree of complexity and confusion as that relating to gaming and betting. . . . The statutes seem to be the result of uncertainty, of timidity, and of compromise. The obscurity of many of the decisions springs almost inevitably from the obscurity of the statutes on which they are given."³ Despite these lugubrious pronouncements Mr. H. A. Street⁴ is not "afraid to touch it," and his attempt to rationalise and understand the law of gaming is one of the outstanding contributions to legal literature of recent years. The task demanded boldness as well as great learning and the fearlessness of the author's discussions of controversial matters is a feature of the book.

Parliament, in legislating on the subject of gaming, has fought shy of definitions, and this reticence has cast on the Courts the difficult task of defining the terms and phrases used in the various Acts. Mr. Street, therefore, has had to devote Part I of his book (230 pp.) to the subject of definitions. In this part he makes a vigorous attack on the generally accepted thesis that all games are lawful at common law. The argument is vigorous and ingenious, and points to the conclusion that the playing of games may be illegal at common law if, from the nature of the game, or the manner in which it is played, it has a tendency to injure public morals. Even if that conclusion be admitted it does not seem vitally to impair the accuracy of the orthodox statement, since even the most cherished principles of the law—as, for example, freedom of contract—have had to give way to the dictates of public policy.

Part II is devoted to the criminal law, with a short, but useful, chapter on specialised points of procedure and evidence.

Part III, "Actions," is concerned with the civil law of gaming and includes notes on foreign laws and the conflict of laws. In an appendix the learned author has collected some interesting notes on foreign laws of gaming. The subject, however, is not one which lends itself to comparative study and so these notes do not add appreciably to the value of the book.

It is impossible in a review of so comprehensive a study to attempt any

¹ Other statutory creations such as the law of Rent Restriction and the law of Income Tax, it must be admitted, shew a comparable complexity.

² *R. v. Perry and Dransfield*, Yorkshire Evening Post, May 18th, 1936.

³ Foreword, *The Law of Gaming and Betting*, by C. F. Shoolbred.

⁴ H. A. Street, *Law of Gaming*, London. Sweet and Maxwell Ltd. 1937. L and cviii and 760 pp. 42s.

detailed criticism. It must suffice to say that the practitioner who consults this work will find an interesting and valuable discussion of any point with which he may be confronted. The author is not afraid to suggest solutions of difficult points, without obscuring other points of view by dogmatic statements of his own. The much battered *Hyams v. Stuart-King* is again subjected to criticism and the author expresses a pious hope that the House of Lords may yet have an opportunity of conferring its benediction on the dissenting judgment of Fletcher Moulton, L.J. He indicates (p. 407) that, on the principle of *R. v. Denyer*⁵, the Court of Criminal Appeal might think that the new contract amounts to blackmail. This line of attack has now been tried out in the Courts, without success: *Burden v. Harris*.⁶ It is interesting to note, in passing, that the problem posed by the case of *Hyams v. Stuart-King* does not arise in the United States, where it has been held that wagering agreements are not only void but illegal: see *Irwin v. Williar*⁷; *Harvey v. Merrill*.⁸

It can be safely predicted that this book will establish itself as the standard work on the law of gaming. It is superior in point of style to most other practitioners' books. The jerky, spasmodic style which is usually adopted is replaced by a fluent and connected prose style. Moreover, and again unlike the majority of "standard books," the text is enriched by frequent reference to the general literature of the subject (i.e. quite apart from statutes and cases), which, as Dr. Stallybrass has pointed out,⁹ is important for the practitioner no less than for the student.

⁵ [1926] 2 K.B. 58.

⁶ 54 T.L.R. 86.

⁷ 110 U.S. 499, 510.

⁸ 150 Mass. 1. This case and *Irwin v. Williar* are cited in Pollock on Contracts, 10th ed., p. 337 (n).

⁹ *Mod. Law Rev.*, vol. II No. 1, on page 91.

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